

No. 17303

United States
Court of Appeals
for the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSO-
CIATION OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

MAR 2 1961

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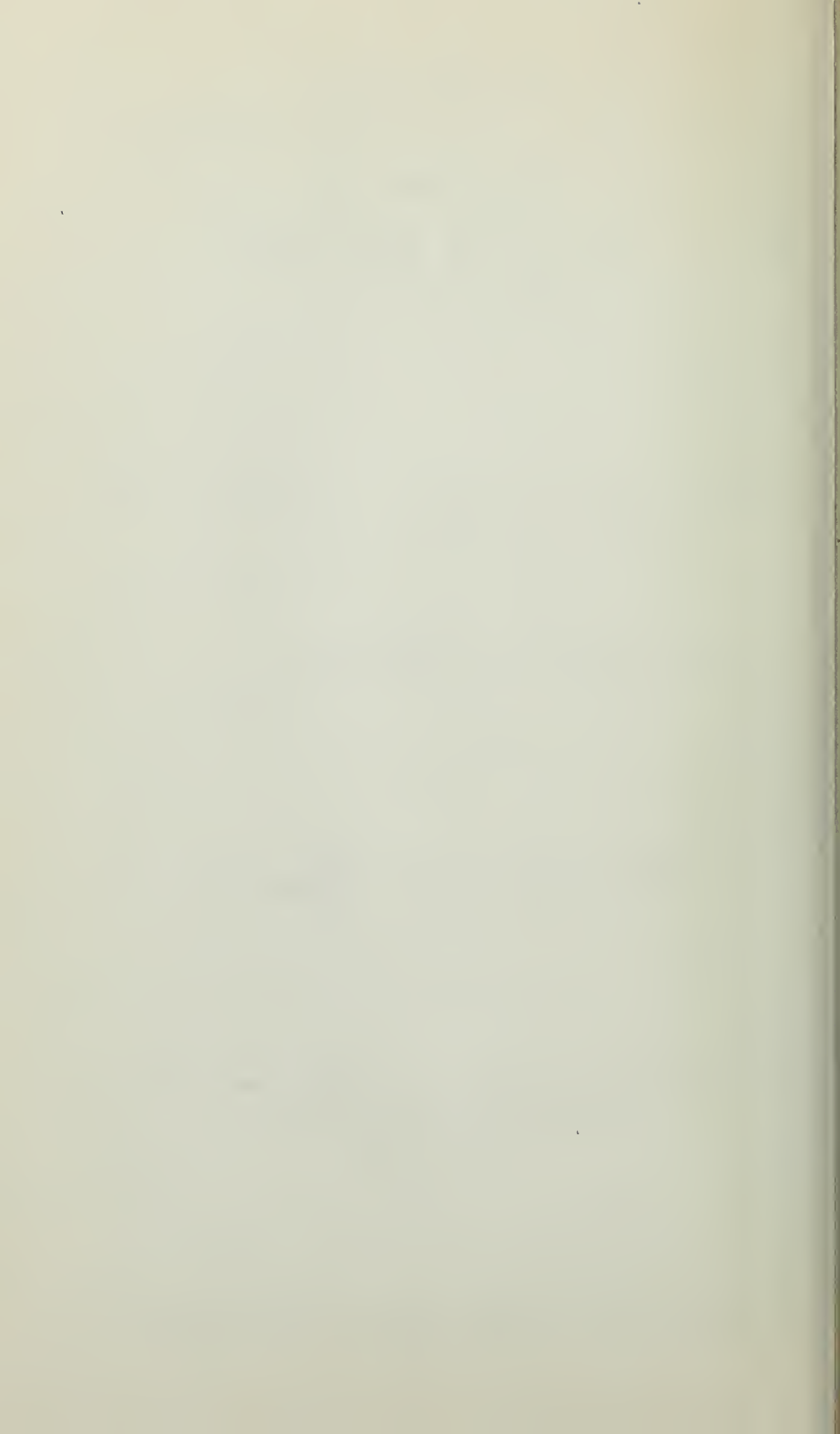
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA
SANDS, His Wife; JAMES E. COMRADA
and FLORENCE COMRADA, His Wife;
FREDERICK D. HOLBROOK, Trustee in
Bankruptcy of JAMES E. COMRADA, and
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF BREMERTON,

Defendants.

PRETRIAL ORDER

As the result of a pre-trial conference heretofore had, whereat plaintiff was represented by James F. McAteer, Assistant United States Attorney; and the defendant Earl L. Sands by David L. Jamieson, and the defendant Frederick D. Holbrook by Eleanor Edwards, and First Federal Savings and Loan Association of Bremerton by Marion Garland, and the defendants James E. Comrada and Florence Comrada, his wife, not appearing, the following issues of fact and law were framed and exhibits identified.

Admitted Facts

The following are the admitted facts herein:

1. This is a suit of a civil nature brought by the United States of America, and jurisdiction therefor rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff seeks a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

2. The Postmaster General, hereinafter mentioned, is an agent of the plaintiff, United States of America, a corporation sovereign and at all times and in all matters hereinafter mentioned, said Postmaster General, his officers and agents acted for and on behalf of the plaintiff, which was and is the real party in interest under and by virtue of Article 1, Section 8 of the Federal Constitution and 39 U.S.C.A 794f.

3. The defendants, Earl L. Sands, a/k/a E. L. Sands, and his wife, Rita Sands, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington, in the Northern Division of the Western District of Washington.

4. The defendants, James E. Comrada and his wife, Florence Comrada, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington, in the

Northern Division of the Western District of Washington.

* * *

6. The defendant First Federal Savings and Loan Association of Bremerton is a federal savings and loan association organized under the laws of the United States and doing business in the State of Washington, having its principal place of business in Bremerton, Washington, in the Northern Division of the Western District of Washington.

7. The defendants, James E. Comrada and Florence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington), according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of \$1,480.00 with one 5-year renewal option at \$1,320.00 a year. A copy of said proposal to lease quarters, as amended and accepted, is attached hereto, marked Exhibit "A," and by this reference made a part hereof as though fully set forth.

8. On January 28, 1956, a contract was entered into between the defendant James E. Comrada and the defendant Earl L. Sands, d/b/a Sands Construction Company, wherein the defendant Earl L. Sands agreed to construct the post office building at Wins-

low, Washington, for a total price of \$17,050.00 in accordance with Postal specifications, as per plans furnished.

9. On May 23, 1956, the defendants, James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant E. L. Sands, the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M., described as follows:

* * *

10. On July 25, 1956, the defendants, E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant First Federal Savings and Loan Association of Bremerton, to secure a note of even date in the amount of \$21,000.00. The purpose of said mortgage and note was to finance the construction of a post office building on the mortgaged property.

11. The defendant First Federal Savings and Loan Association of Bremerton in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, brought an action to foreclose the foregoing mortgage. A judgment of foreclosure was entered in said action, and on March 25, 1960, a Certificate of Sale of Real Estate was issued by the Sheriff of Kitsap County to First Federal Sav-

ings and Loan Association of Bremerton, covering the property mortgaged by the mortgage of July 25, 1956. The United States was dismissed from the action as a party defendant on January 18, 1960.

12. On December 1, 1956, the Post Office Department began occupancy of the building built by defendant Sands, and located on the property described in paragraph 9, notwithstanding the fact that the building was not fully completed, and such occupancy has continued at all times since December 1, 1956.

* * *

14. In November, 1958, the defendants, James E. Comrada and Florence Comrada, executed a quitclaim deed to E. L. Sands and Rita D. Sands covering the said post office site.

* * *

16. A formal lease between the plaintiff, United States of America, or the United States Post Office Department, has never been executed with the defendants, James E. Comrada and Florence Comrada, his wife, or with the defendants Earl L. Sands and Rita Sands, his wife, or with the defendant First Federal Savings and Loan Association.

* * *

18. That the Sheriff's Certificate of Sale of Real Estate issued on March 25, 1960, in favor of First

Federal Savings and Loan Association of Bremerton, makes them owners of the property (post office site, Winslow, Washington), free and clear of any interest of James E. Comrada and Florence Comrada or Frederick D. Holbrook, their trustee in Bankruptcy, or Earl L. Sands and Rita Sands, his wife, subject only to rights of redemption under the law of the State of Washington.

19. No payments of rent (or damages) have been made by plaintiff to any of the parties hereto except payments made by plaintiff for completion of construction and for repairs.

20. That on May 23, 1956, a written contract was entered into between James E. Comrada, Florence E. Comrada, and Earl L. Sands, which contract superseded the contract of January 28, 1956. In this contract the parties agreed, *inter alia*, as follows:

“2. The contractor [Sands] will in a good, substantial and workmanlike manner, and in strict compliance with, and conformity to, the drawings, plans and specifications prepared by the United States Government, which said drawings, plans and specifications are made by reference an integral part of this contract, provide all the materials and perform all the work for the construction of that certain post-office building at Winslow, Washington, * * *

“10. It is understood and agreed that the owner will pay to the contractor for the work and ma-

terials involved in and appertaining to this contract the sum of \$22,239.99, [in certain specified installments] * * *

“13. The owner [Comrada] shall assign to the contractor all of his right, title and interest in the rents, and any other income accruing from the building constructed as heretofore agreed, and any and all such income shall be paid to the contractor, his heirs or assigns, and applied against indebtedness created by this contract.

“As soon as the principal and interest is paid to the contractor by the owner, then the contractor shall give the owner a warranty deed and the rents and income under the assignment shall immediately revert to the owner.

“14. As a further requirement on the part of the owner it shall be necessary, and he shall give to the contractor a warranty deed on the above-described real property, * * *”

* * *

25. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 9 of Admitted Facts herein referred to as the post office property in the amount of \$8,000, from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was \$12,454.12

on the adjacent "restaurant property." The loan application was amended to provide for a loan of \$21,000, to be secured by the mortgage of both the restaurant and post office property, and that \$12,454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property.

In the loan application the improvements located on the real estate were designated as a restaurant built in 1955, and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that \$8,545.88 of the loan proceeds were to be used for "completing building the above-described post office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of \$375.00 per month, but that there was no lease of the adjacent post office property. Mr. Paul Rosenbarger, president of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property.

A restaurant, 21 feet, 2 inches by 100 feet, with partial basement 21 feet, 2 inches by 11 feet, which improvement was appraised at \$16,051.

A post office, 27 feet by 74 feet, which improvement was appraised at \$16,453 (when completed).

The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report.

First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department had a lease agreement prior to accepting the loan.

First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands, dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (Policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that the building under construction was to be used as a post office.

26. On or about November 9, 1956, the defendant First Federal Savings and Loan Association of Bremerton, was requested to sign a form acknowledging that the mortgage of July 25, 1956, executed by Sands, was subordinate to the lease of the Post Office Department. The First Federal Savings and Loan Association of Bremerton declined to execute the subordination agreement.

Plaintiff's Contentions

Plaintiff's contentions are as follows:

1. That the accepted proposal to lease quarters (paragraph 7 Admitted Facts) as between the Post Office Department and the defendants, James E. Comrada and Florence Comrada, was valid as a lease under Federal law.

2. In January of 1956 and prior to May 23, 1956, the defendant, Earl L. Sands, had actual or constructive knowledge of Comrada's agreement with the United States and of the terms and conditions therein.

3. Sands took title to the property on May 23, 1956, subject to the terms of the accepted proposal to lease quarter which was binding on him as a lease under Federal law.

* * *

5. The plaintiff has occupied the post office premises at Winslow, Washington, at all times since December 1, 1956. Under the terms of the proposal to lease quarters, as amended and accepted, there is due and owing from the plaintiff as of March 25, 1960, for rent during such 40-month period, the sum of \$4,909.44 less the aforementioned cost of completion of construction and repairs in the amount of \$932.35, making the amount of \$3,977.09.

Pursuant to Rule 67, Federal Rules of Civil Procedure, and 28 U.S.C.A. 2041, plaintiff on December

4, 1959, deposited into the registry of the court the sum of \$3,529.25.

6. The facts and circumstances surrounding the Government's initial entry upon the property in December, 1956, with Sands' permission, the completion of the improvements by the Government with Sands' knowledge and consent and the subsequent tender to him of rent by the Government on numerous occasions are all facts which constitute partial performance of Comradas' lease agreement by Sands and serve to take it out of the statute of frauds.

7. The validity and effect of the proposal to lease quarters as amended, and accepted by the Government are to be determined by Federal, not State law.

8. On July 25, 1956, prior to accepting a mortgage on the site of the proposed post office at Winslow, Washington, the defendant First Federal Savings and Loan Association of Bremerton, had notice of facts sufficient to put it on inquiry that the United States Government would occupy the building as a post office under a prior lease. At such time the defendant First Federal Savings and Loan Association of Bremerton, in the conduct of sound banking practice, should have inquired of Mr. Charles Seary, the local postmaster of Winslow, Washington, or of the appropriate post office officer in Seattle, Washington, of the status of the post

office in and to the Sands' property, and such inquiry would have disclosed the Comrada post office agreement (paragraph 7 Admitted Facts). The mortgage of July 25, 1956, on such property was subject to the rights of the Government under the proposal to lease agreement.

* * *

Contentions of Defendant First Federal Savings and Loan Association of Bremerton

The Defendant, First Federal Savings and Loan Association of Bremerton, Contentions are:

1. That at the time they executed the mortgage with Earl L. Sands and Rita Sands, on July 25, 1956, the United States Government was not in possession, had not recorded any lease, had by no other acts acted to stop the operation of the statute of frauds which provides that all interests in real estate shall be signed and acknowledged by the person to be bound thereby, nor had they complied with the recording statute.

2. The First Federal Savings and Loan Association of Bremerton contends that their recording of the mortgage on July 25, 1956, put the United States Government on notice of their mortgage and that in addition thereto the United States Government had actual notice of the mortgage before they took possession or changed their position under the purported lease.

3. The Defendant, First Federal Savings and Loan Association of Bremerton, contends when they foreclosed their mortgage and received the Sheriff's Certificate of Sale on the 25th of March, 1960, that they became the owner in fee as against all parties including the United States Government, subject only to the right of redemption.

4. That First Federal Savings and Loan Association of Bremerton has no knowledge or facts that would put them on notice of any unrecorded agreements between James E. Comrada and Earl L. Sands, and are not bound thereby.

5. That the post office structure was one commonly referred to by real estate rental agencies as a general purpose commercial building, to designate it from a one-purpose building.

6. That a reasonable rental value of the premises occupied by the United States Post Office is \$330.00 per month and that they should be given a judgment for that amount from the 25th day of March, 1960, until the date of judgment.

* * *

Issues of Fact

The following are the issues of fact to be determined by the Court herein:

1. On January 28, 1956, and on May 23, 1956, what knowledge did Earl L. Sands have of the Post Office Department's intention to occupy the post

office building to be built at Winslow, and of the terms of the proposal to lease.

2. When did defendant Sands first learn of the contract to lease between Comrada and the Government and the amount of monthly rental provided for in such contract.

* * *

Issues of Law

The following are the issues of law to be determined by the Court herein:

1.(a) Was the Proposal to lease agreement valid in law or equity to create an enforceable interest in the property described therein in favor of the Government against the Comradas.

(b) Under Federal law, are such unacknowledged agreements to lease valid between the parties, although not executed with the formalities required of leases under State law.

2. Where a building contract provides for the furnishing by a contractor of labor and materials for the construction of a post office building to be built in "strict compliance with, and conformity to the drawings, plans, and specifications prepared by the United States Government" at a cost to the owner of the real estate of \$22,239.99, and provides for the assignment of rents and income of the building to be built on the owner's property to the contractor to be applied against the indebtedness of the

owner, and provides for a conveyance from owner to contractor by warranty deed of the real estate on which the building is to be built, but further providing for a reconveyance upon payment to the contractor of the principal and interest.

(a) Does such a contract contemplate that the warranty deed from owner to contractor shall be given subject to the owners' obligation to lease the building to the Government at the rental and for the term previously agreed between the owner and the Post Office Department.

(b) Does such a contract contemplate that the owner (who is entitled to a reconveyance upon fulfillment of certain conditions) shall manage the property and that the contractor shall hold subject to the terms of leases or rental agreements entered into between the owner and the Post Office Department.

3. On May 23, 1956, was Earl L. Sands on notice of the Post Office Department's intention to occupy the proposed building and did he take title to the post office site as assignee of James E. Comrada's and Florence Comrada's contract rights and obligations with the Post Office Department.

* * *

6. Are the terms and conditions of a "proposal to lease quarters" entered into between the Post Office Department and an owner of real estate (Com-

rada), binding upon a person acquiring title (Sands), to the property involved with notice of the post office's intended use and constructive notice of the post office's claim of lease to such property.

7. Are the terms and conditions of a "proposal to lease quarters" entered into between the Post Office Department and an owner of real estate binding upon a mortgagee who accepts a security interest in the property involved with notice of the post office's intended use and intention to lease such property.

8. Did the defendant First Federal Savings and Loan Association of Bremerton, as purchaser under the Sheriff's Certificate of Sale (paragraph 18 of Admitted Facts) take subject to the rights of the Post Office Department under the proposal to lease agreement (paragraph 7 of Admitted Facts).

* * *

10. If the proposal to lease agreement is governed by State law and is invalid if unacknowledged unless equitable factors are present, has there been sufficient part performance by the lessee Post Office Department to make the agreement enforceable as against the lessor.

11. If the proposal to lease agreement is construed as an oral lease because not acknowledged as required by State law and if not enforceable in equity under the doctrine of partial performance,

was such agreement effective to create a tenancy from month to month or from period to period. If not a tenant from month month, but from period to period, what was the duration of the period, or was the Government a tenant at will.

* * *

13. Is an agreement to lease real property valid in the State of Washington, if it does not contain a legal description of the premises.

* * *

Action by the Court

The foregoing pre-trial order has been approved by the parties hereto, as evidenced by the signatures of their counsel herein; and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by agreement of the parties and approval of the Court.

Dated this 13th day of September, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

/s/ ELEANOR EDWARDS,
Attorney for Defendant
Frederick D. Holbrook.

/s/ DAVID L. JAMIESON,
Attorney for Defendant
Sands.

/s/ MARION GARLAND,
Attorney for Defendant First Federal Savings &
Loan Association of Bremerton.

Lodged August 29, 1960.

[Endorsed]: Filed September 13, 1960.

United States District Court, Western District of
Washington, Northern Division

No. 4923

EARL L. SANDS and RITA D. SANDS, Husband
and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA
SANDS, His Wife; JAMES E. COMRADA
and FLORENCE COMRADA, His Wife;

FREDERICK D. HOLBROOK, Trustee in
Bankruptcy of JAMES E. COMRADA, and
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF BREMERTON,

Defendants.

MEMORANDUM OPINION

This memorandum opinion relates to two separate actions consolidated for trial because of the identity of the parties involved and a similarity of issues. The first action, number 4923, was brought by Earl L. Sands and Rita D. Sands against the United States Government and as amended by stipulation and pretrial order the plaintiffs seek damages in the amount of \$9,999.99 for an alleged unlawful taking without just compensation. In the second action, number 4959, brought by the United States against Earl L. Sands and wife, James E. Comrada and wife, Frederic P. Holbrook, Trustee in Bankruptcy of James E. Comrada, and First Federal Savings and Loan Association of Bremerton, the United States seeks a declaratory judgment as to the rights of the respective parties arising out of a proposal to lease certain property for use as a post office. Frederic P. Holbrook, Trustee in Bankruptcy of James E. Comrada, and Earl L. Sands, entered into an agreement whereby Holbrook, in consideration of Sands assigning to him any proceeds in this action up to \$1,400, assigned to Sands any rights or interest he may have in any additional proceeds of this action, and withdrew as a party.

Neither James nor Florence Comrada took part in the trial of this lawsuit.

Inasmuch as the pretrial orders set out in considerable detail the admitted and undisputed facts it will serve no useful purpose to repeat them all at this time. However, a brief resume of the circumstances which gave rise to these actions will help in clarifying the issues involved.

In response to a request for bids to furnish postal facilities on Bainbridge Island, James Comrada submitted a proposal to lease quarters to the Postmaster General in June of 1955. This proposal was amended in December of that year and accepted by the Postmaster General in February of 1956. In January, 1956, Comrada entered into a contract with Sands, whereby Sands agreed to construct a post office building on property owned by Comrada for an agreed figure. On May 23, 1956, Comrada conveyed to Sands, by statutory warranty deed, the real estate on which the building was then under construction. On July 25, 1956, Sands executed a mortgage on this property, as security for a loan, to the First Federal Savings and Loan Association of Bremerton. That mortgage has subsequently been foreclosed and the First Federal Savings and Loan Association has become the legal owner of the property subject only to Sands' right of redemption.

The construction of the building did not proceed as rapidly as was desired by the Government and in the fall of 1956, they began to urge an early comple-

tion. During October, the Government began to insist that the building be ready for occupancy not later than December 1, and it was at this point that the dispute arose as to the terms of the occupancy. On December 1, 1956, the Government secured possession of the building and has continued to operate a postal facility therein to the commencement of this action.

It is clear that the basic issue in this case is the nature and validity of the alleged lease or proposal to lease which is Plaintiff's Exhibit No. 1. At the outset we are confronted with the question of whether this document is to be construed as a lease or as an agreement to lease.

As I announced at the commencement of the trial, Federal law and not Washington law should govern this suit. At this point I will briefly state my reasons for so holding. When the United States Government sets out to establish postal facilities, they are engaged in performing an essential governmental function as specifically empowered by the Constitution. Whenever the Government is engaged in such an activity, an activity which by its very nature will be carried on in all cities, towns and communities throughout all States of the Union, it is important that uniformity be achieved. To require that negotiations for securing postal facilities be conducted within the framework of each State's laws, which are admittedly varied and often contradictory, would impose an intolerable burden upon the Government. The respect which the Federal Government

normally accords the laws of each individual state must give way in the interest of uniformity when the Government is performing a Constitutional function. This was the holding of the United States Supreme Court in *Clearfield Trust Company v. United States*, 318 U.S. 363 (1943) and the same reasoning used there applies to this case. A similar conclusion was also reached in *United States v. Allegheny County*, 322 U.S. 174 (1944) and *United States v. View Crest Garden Apts., Inc.*, 268 F. 2d 380 (9 Cir. 1959). It should be observed in passing that the statement made in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) that "there is no Federal common law" has been limited in its application to those cases in which Federal jurisdiction is based on diversity of citizenship. See *United States v. Standard Oil Co.*, 332 U. S. 301 (1947).

Proceeding, therefore, under the mandate of Federal law, is the proposal to lease quarters executed by Comrada and the Government to be construed as a lease or as an agreement to lease? The Government to be construed as a lease or as an agreement to lease? The Government contends that under Federal law this proposal should be construed as a lease, not merely an agreement to lease. With this I cannot agree. As is well stated in the *American Law of Property*, §3.17:

"Whether a given transaction results in a lease or an agreement to give a lease is a matter of intention to be determined from the language

and acts of the parties. No precise words are necessary to create a lease, but the use of language of present demise—demise, lease, to farm let—indicates that a lease is intended.”

In *United States v. 257.654 Acres of Land, etc.*, 72 F. Supp. 903 (D.C. Haw. 1947) the court was faced with a problem similar to the present one. That court emphasized that it is a question of intention. Did the parties to the agreement intend that it should be a presently-operative lease or an agreement to later execute a lease? In addition, the district court pointed out that where the instrument in question provides for the later execution of a lease that fact is some evidence that the parties did not intend a present demise of the premises.

A consideration of all the exhibits and testimony leads irresistibly to the conclusion that both Comrada and the Government did not intend the proposal they executed to be a lease. Not only does the proposal itself provide that the undersigned “agrees to lease,” but the testimony of the Government’s own witness was to the effect that a later lease was contemplated and would be entered into. Nowhere was any language used which indicates that a present demise of the premises was intended. Any conclusion that could be drawn from the fact that Comrada signed the sample copy of the lease on the reverse side of the proposal, which action is at the most ambiguous, can have no effect on the result. Unilateral intention is not sufficient, and as I have already indicated, the Government did not intend

to enter into a lease at that time. Therefore, it is my conclusion that the proposal to lease is in law an agreement to execute a lease in the future.

This conclusion leads then to the next consideration, that is, what is the legal effect of an agreement to lease. What interests did the execution of this agreement and the action of the parties thereunder, create?

The prevailing general rule is that an agreement to lease creates a legal relationship similar to that created by an earnest money agreement. That is, it creates an equitable right in the proposed lessee, and this equitable right can be specifically enforced against the proposed lessor or his successor in interest, provided the general requirements for specific performance are met. However, conveyance of the property to a bona fide purchaser or the creation of a subsequent interest by a bona fide encumbrancer will cut off the equitable rights of the proposed lessee. *Halsell v. Renfrow*, 202 U.S. 287 (1906). On the other hand, however, if the subsequent purchaser or encumbrancer obtains his interest in the property with notice of the rights of the proposed lessee or vendee, he is bound by those rights and the contract can be specifically enforced against him. See *Ebensberger v. Sinclair Refining Co.*, 165 F. 2d 803 (5 Cir. 1948).

Therefore, the key factual question, as I see it, is, did Sands and/or the First Federal Savings and

Loan Association have notice of the agreement to lease executed by the Government and Comrada?

Legal notice can be either one of two types—actual or constructive. Constructive notice is generally held to be that notice which a person is deemed to have by operation of law, commonly through the recording statutes. Had the Government recorded this agreement, assuming it was recordable, Sands and the First Federal Savings and Loan Association would have had constructive notice of the Government's interest in the property and this would have ended the case. However, the instrument was not recorded. Consequently, unless Sands and First Federal had actual notice of the Government's interest, they would, I believe, have the status of a bona fide purchaser and a bona fide encumbrancer.

Like notice itself, actual notice also consists of two types. In its purest sense actual notice is knowledge of the essential facts involved. There is nothing in the evidence to indicate that either Sands or First Federal had actual knowledge of the agreement to lease and its terms. However, actual notice may also consist of implied or inquiry notice.

As was well stated by the Second Circuit Court of Appeals in *The Tompkins*, 13 F. 2d 552 (2 Cir. 1926):

“If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care to make further accessible inquiries, and he avoids the inquiry,

he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed.”

See also *The Lulu*, 77 U.S. 192, page 200 (1868) where the United States Supreme Court uses much the same language.

Thus it can be seen that if either Sands or the First Federal Savings and Loan had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the Government had in this property, they would be charged with having such knowledge and their interests would be subject to that of the Government. It is my opinion, and I so find, that such was the case. Both Sands and First Federal Savings and Loan Association are chargeable with actual notice of the Government's interests.

It is undisputed that both Sands and the First Federal Savings and Loan Association knew that there was a building being constructed on the property and that the building was to be used for a particular purpose—a post office. Sands knew this by his own admission, and the First Federal Savings and Loan knew through a statement on the loan application and an inspection made by their

president. This was stipulated in the pretrial order in paragraph 25. The presence of a building being built for a particular purpose and for use by a particular tenant should be sufficient notice to stimulate an investigation to find out what interest or arrangement the eventual occupant might have with the present owner. To do less would fail to fulfill the duty imposed by the law. *Adams v. Willis*, 83 S.E. 2d 171 (S.C. 1954), and *Rochester Poster Advertising Co. v. Smithers*, 231 N.Y.S. 315 (1928) are cases in which a structure on the property gave notice of the rights of another. It does not seem reasonable that a person would be constructing a post office on his property with only a hope that the Post Office Department might, in the future, rent it from him. Reason and common experience dictate that some sort of an arrangement or agreement must have existed. The evidence in this case shows that any investigation or inquiry made either of the local postmaster or the postal inspector would have led to a disclosure that the Government did have an agreement to lease the premises after construction of the building as well as the terms of such proposed lease. The fact that this information was not as readily available as are public records should make no difference. The postal inspector testified that he would have given the information to any properly interested person seeking it for legitimate purposes, or at least have referred them to Comrada. Further, there has been no evidence that Comrada, had he been questioned, would not have disclosed the details of his agreement.

Therefore, it is my conclusion that under the evidence a reasonably prudent person would have sought further information. Had inquiry been made by Sands or First Federal as to the particulars of any rental or lease arrangement existing with respect to the building under construction, full information would have been forthcoming from the postal inspector or, so far as the evidence establishes, from Comrada. As to the suggestion made by First Federal Savings and Loan, that they performed their duty of making reasonable inquiry when they asked Sands if the Government had a lease, it does not appear to me to be prudent banking practice to accept without further investigation a prospective borrower's statements as to the facts surrounding his security.

Both Sands and the First Federal have urged other contentions to defeat the Government's claim with respect to specific performance. One argument is that the terms of the agreement are not sufficiently definite to be specifically enforced. This is not supported by the facts. The proposal to lease states that the rental is to be so much per year, payable monthly. The fact that the exact day of the month on which the rental is due is not material. It is also alleged that the description of the property in the agreement is not specific enough. As to this contention, it is my view that the general rule as to the degree of certainty required with respect to description of real estate in contracts of lease or sale thereof has been met by the Proposal to Lease, itself, when

considered in light of other admissible evidence as to the identity of the real estate and building involved. See 49 Am. Jur., Statute of Frauds, Sections 347, 348, 349, beginning page 655; 37 C.J.S., Stat. of Frauds, Sections 182, 183, 184, beginning page 668. Although the description of the premises, as set out in the proposal to lease certainly leaves much to be desired, the fact remains, first, there was never any question in the minds of any of the parties as to the specific property involved, and, second, the Government was in possession of the property at the time of the commencement of this action, and therefore any uncertainty as to the location of the property has been cleared up by the action of the parties. 81 C.J.S., Specific Performance, Section 33. The peculiar Washington rule which requires that agreements such as this contain a legal description of the property involved before specific performance will be ordered is not controlling and should not be applied here. As I indicated at the outset, Federal law is applicable and while in determining what the Federal law is, I may be free to follow State court decisions as indicative of what the law is, or should be, to adopt the Washington rule would be accepting an extreme minority rule which, as far as I can ascertain, has not been followed by any other State in the Union.

The "clean hands" doctrine has also been raised as a defense. It is my opinion that this contention is without merit. The circumstances surrounding the obtaining of the key to the building by the Winslow

postmaster, although disputed, cannot be held to be unconscionable conduct sufficient to bar equitable relief. At the time the key was obtained the Government under the interpretation I have adopted had a right to possession and they were only attempting to enforce this right by the fastest peaceable means. As for the contention that the Government was guilty of bad faith by not having this agreement recorded, this also is without merit. Certainly recording the agreement would seem to be the most effective way for the Government to protect their interests, but the fact remains that the Government was under no duty to do so. The Government, or for that matter any private individual, should not and cannot be penalized, except perhaps under extraordinary circumstances not present here, for not doing what they are not required by law to do. A thorough search has failed to reveal any case in which the failure to record was held to be conduct sufficient to bar equitable relief, and none have been cited to me.

The final contention with respect to the validity and enforcement of the lease agreement is that there were modifications in the building which substantially changed the terms of the proposal. This contention cannot be sustained. Admittedly, there were modifications made and it is disputed as to who ordered them. However, exactly who ordered what is not important so far as the enforceability of the proposal is concerned, since I do not consider the changes that were made, as disclosed by the evidence, as being substantial.

It is my opinion that the proposal to lease is valid and binding upon Comrada, and also upon both Sands and the First Federal Savings and Loan Association, as subsequent owners or mortgagee, concluding, as I have, that they acquired their interests in the subject property with what constitutes actual notice of the rights of the United States.

The remaining issue for determination relates to the rights of the various parties to the rents accumulated under the occupancy of the post office by the United States, as well as the right of the Government to set off against said rents for the sum expended for completion of the building in the amount of \$716.55 and repairs to the occupied premises since December 1, 1956, in the amount of \$215.80. With respect to the cost of completion of construction, paragraph 23 of the admitted facts of the pretrial order, approved by counsel for all parties, provides, in part, as follows:

“If the Court finds that the proposal to lease quarters between Comrada and the Post Office Department is binding on the parties hereto, such expenditure shall be a setoff of the monies due from the post office.”

The Court having found the proposal to lease binding on all the parties, the amount expended by the Government for completion of the building in the amount of \$716.55, may be set off against the amount owing for rents.

With respect to the admitted amount of \$215.80 paid for repairs to the post office building and premises, there is no evidence to establish that the amount expended and the repairs made are other than reasonable and under the terms of the proposal to lease this item is chargeable to the lessor and may be set off against the rents owing to the owners.

The troublesome question arising in determining the portion of rent payable as between Comrada or his trustee in bankruptcy on the one hand and Sands on the other, has been simplified because of the "Stipulation and Partial Assignment of Proceeds" entered into and agreed to between Sands and the Trustee in Bankruptcy, wherein it is "Stipulated and Agreed that Frederick P. Holbrook, Trustee for James E. Comrada, holds all rights to the net sum of Fourteen Hundred Dollars (\$1,400) out of any and all rents or damages due to Earl L. Sands, James E. Comrada and/or Frederic P. Holbrook, Trustee for James E. Comrada. * * *" Under this stipulation \$1,400 of the rents owing by the Government are payable to Frederic P. Holbrook, Trustee in Bankruptcy for James E. Comrada, and the balance of rent owing by the United States from December 1, 1956, to March 25, 1960, less \$716.55 for completion of the building, and less that portion of \$215.80 expended for repair to the post office building and premises between December 1, 1956, and March 25, 1960, is payable to Sands.

Rent accruing after March 25, 1960, is payable to

the First Federal Savings and Loan Association of Bremerton or any subsequent owner.

In view of the decision I have reached with respect to the issues presented in the declaratory judgment action—Cause No. 4959—the plaintiff in Cause No. 4923 (*Sands v. United States*), is not entitled to recover except to the extent I have indicated, and it would appear that that action should be dismissed after entry of judgment in Cause No. 4959.

Counsel for the United States will prepare and submit upon notice and not later than November 14, 1960, findings of fact, conclusions of law and judgment or decree in accordance with the views I have expressed. Each party will pay his or its own costs.

Dated October 18, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed October 18, 1960.

[Title of District Court and Cause.]

No. 4923

No. 4959

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled causes consolidated for trial came on regularly before the above-entitled court

and the court having duly considered the evidence and being fully advised in the premises filed a memorandum opinion on October 18, 1960, and now enters the following:

Findings of Fact

* * *

2. Cause number 4959 is a suit of a civil nature brought by the United States and jurisdiction rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff is entitled to a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

* * *

10. The defendants, James E. Comrada and Florence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington), according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of \$1,480.00 with one 5-year renewal option at \$1,320.00 a year. Said proposal to lease was plaintiff's Exhibit No. 1.

11. On January 28, 1956, a contract was entered into between the defendant, James E. Comrada, and the defendant, Earl L. Sands, d/b/a Sands

Construction Company, wherein the defendant, Earl L. Sands, agreed to construct the post office building at Winslow, Washington, for a total price of \$17,050.00 in accordance with postal specifications, as per plans furnished to Sands by Comrada.

12. On May 23, 1956, the defendants, James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant, E. L. Sands, the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M., described as follows:

* * *

14. On July 25, 1956, the defendants, E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant First Federal Savings and Loan Association of Bremerton to secure a note of even date in the amount of \$21,000.00. The purpose of said mortgage and note was to finance the construction of a post office building on the mortgaged property.

15. The defendant First Federal Savings and Loan Association of Bremerton in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, brought an action to foreclose the foregoing mortgage. A judgment of foreclosure

was entered in said action, and on March 25, 1960, a Certificate of Sale of Real Estate was issued by the Sheriff of Kitsap County to First Federal Savings and Loan Association of Bremerton covering the property mortgaged by the mortgage of July 25, 1956. The United States was dismissed from the action as a party defendant on January 18, 1960.

* * *

18. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 12 of Findings of Fact herein referred to as the post office property in the amount of \$8,000.00 from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was \$12,454.12 on the adjacent "restaurant property." The loan application was amended to provide for a loan of \$21,000.00 to be secured by the mortgage of both the restaurant and post office property and that \$12,454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property. In the loan application the improvements located on the real estate were designated as a restaurant built in 1955 and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that \$8,545.88 of the loan proceeds were to be used for "completing building the above-described post

office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of \$375.00 per month but that there was no lease of the adjacent post office property. Mr. Paul Rosenbarger, President of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property, a restaurant appraised at \$16,051, and a post office appraised at \$16,453 (when completed). The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office and designated the building as a post office in his appraisal report. First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department has a lease agreement prior to accepting the loan. On inquiry from the mortgagor, Mr. Sands stated there was no lease. First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that

the building under construction was to be used as a post office.

19. Earl L. Sands had actual knowledge prior to May 23, 1956, that the building under construction at Winslow, Washington, on the property originally owned by James E. Comrada was being built for a particular purpose, a post office, and for use by a particular tenant, the United States Post Office Department.

20. Earl L. Sands and First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or of a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the government had in the subject property. Therefore both Sands and First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States.

21. Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was

reasonably available to any properly interested person and could have been secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming.

22. The proposal to lease quarters as amended and accepted by the government is a valid and enforceable agreement to execute a lease in the future. The terms of such agreement are sufficiently definite, complete and certain so as to meet the requirements of a contract that may be specifically enforced. The premises to be leased was established with certainty by the description of the real estate in the agreement itself together with the other admissible evidence as to the identity of the real estate and building involved including the action of the parties to this action. The fact that (1) there never was any question in the minds of any of the parties as to the specific property involved and (2) that a post office building was built on the subject property in accordance with the proposal to lease quarters and (3) that this is the same property that the government has occupied under claim of lease since December 1, 1956, cleared up any uncertainty as to the location of the property.

24. The government was under no duty to record the proposal to lease quarters agreement and this fact does not impair the government's eligibility for equitable relief in this case.

* * *

26. First Federal Savings and Loan did not perform their duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. That this Court has jurisdiction of the parties hereto and the subject matter of these actions.

2. The nature, validity and enforceability of the proposal to lease quarters (Plaintiff's Exhibit No. 1) is governed by Federal law and not by Washington law. The proposal to lease quarters (hereinafter referred to as the agreement to lease) is an agreement to execute a lease in the future which created an equitable right in the proposed lessee, United States. This equitable right can be specifically enforced against the proposed lessor, James E. Comrada and Florence Comrada, his wife, or their successors in interest, Earl L. Sands and Rita Sands, his wife, and First Federal Savings and Loan Association of Bremerton. That under said

agreement to lease the plaintiff, United States, is entitled to occupy certain premises hereinafter described for a term of fifteen (15) years from December 1, 1956, at an annual rental of \$1,480.00 with one (1) five-year renewal option at \$1,320.00 a year. That the property covered by said agreement to lease is that property situate in the County of Kitsap, State of Washington, more particularly described as follows:

That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M. described as follows:

* * *

3. Earl L. Sands and Rita Sands, his wife, acquired title to the post office site on May 23, 1956, subject to and bound by the rights and interest of the United States under the agreement to lease.

4. The mortgage executed by E. L. Sands and Rita D. Sands, his wife, as mortgagors and First Federal Savings and Loan Association of Bremerton as mortgagee on July 25, 1956, on the post office site and adjacent property was subject to the rights and interest of the United States under the agreement to lease. On March 25, 1960, First Federal Savings and Loan Association, as purchaser under a certificate of sale after foreclosure, acquired title to the mortgaged premises subject to and bound by the said rights and interest of the United States.

* * *

9. Rent accruing after March 25, 1960, is payable to the First Federal Savings and Loan Association of Bremerton or any subsequent owner, in accordance with the terms of the agreement to lease.

10. The United States is entitled to a decree declaring that the United States shall prepare and deliver to the defendants Earl L. Sands and Rita D. Sands, his wife, and to First Federal Savings and Loan Association of Bremerton a lease in good and sufficient form in accordance with the provisions of said agreement to lease and that said lease shall be executed and acknowledged by the said defendants or their successors in interest and that thereafter said lease shall be recorded in the manner provided by law in the State of Washington.

* * *

12. In action number 4959 each party shall pay his or its own costs.

Done in Open Court this 5th day of December, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented and Approved by:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

Lodged November 9, 1960.

[Endorsed]: Filed December 5, 1960.

United States District Court, Western District of
Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS and
RITA SANDS, His Wife; JAMES E. COM-
RADA and FLORENCE COMRADA, His
Wife; FREDERICK D. HOLBROOK, Trustee
in Bankruptcy of James E. Comrada, and
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF BREMERTON,

Defendants.

JUDGMENT AND DECREE

In the above-entitled cause, Findings of Fact and Conclusions of Law having been duly and regularly signed by the Court and filed with the Clerk of this Court, now therefore, it is hereby Ordered, Adjudged and Decreed that:

1. The proposal to lease quarters submitted by James E. Comrada and Florence Comrada, his wife, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, (hereinafter referred to as the agreement to lease), was a valid and specifically enforceable agreement to enter a lease in the future. That under said agreement to lease the plaintiff, United

States, is entitled to occupy certain premises hereinafter described for a term of fifteen (15) years from December 1, 1956, at an annual rental of \$1,480.00 with one (1) five-year renewal option at \$1,320.00 a year. That the property covered by said agreement to lease is that property situate in the County of Kitsap, State of Washington, more particularly described as follows:

That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M. described as follows:

* * *

2. On May 23, 1956, when Earl L. Sands and Rita Sands, his wife, acquired title to the aforementioned property, they acquired title subject to and bound by the rights and interest of the United States under the agreement to lease. On July 25, 1956, and on March 25, 1960, respectively, when First Federal Savings and Loan Association of Bremerton acquired interests in the aforementioned property as mortgagee, and as purchaser under a certificate of sale after foreclosure of said mortgage, the interests so acquired on said dates were subject to the rights and interest of the United States under said agreement to lease.

3. The agreement to lease may be specifically enforced by the United States against the defendants Earl L. Sands and Rita D. Sands, his wife, and against First Federal Savings and Loan Association of Bremerton or their successors in interest.

That the United States shall prepare and deliver to the defendants Earl L. Sands and Rita D. Sands, his wife, and to First Federal Savings and Loan Association of Bremerton a lease in good and sufficient form in accordance with the provisions of said agreement to lease, and said lease shall be executed and acknowledged by the said defendants or their successors in interest and thereafter said lease shall be recorded in the manner provided by law in the State of Washington.

* * *

6. Rent accruing after March 25, 1960, is payable to the First Federal Savings and Loan Association of Bremerton, or any subsequent owner of the subject property, in accordance with the terms of the said agreement to lease.

7. Each party shall pay his or its own costs.

Done in Open Court this 5th day of December, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented and approved by:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

Lodged November 9, 1960.

[Endorsed]: Filed and entered December 5, 1960.

[Title of District Court and Cause.]

No. 4959

NOTICE OF APPEAL

Comes now, First Federal Savings and Loan Association of Bremerton, a defendant in the above-entitled action, and does hereby give Notice of Appeal in that certain judgment entered in the above-entitled action on the 5th day of December, 1960, and each and every part thereof that pertains to the rights of the defendant.

It appeals to all and any other part of said judgment which in any way holds the interest of the United States Post Office Department superior to the interest of First Federal Savings and Loan Association of Bremerton, in and to leased premises.

This appeal is taken from the United States District Court of the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth District.

Dated this 3rd day of February, 1961.

/s/ MARION GARLAND,
GARLAND & BISHOP,

Attorneys for Defendant, First Federal Savings &
Loan Assn.

[Endorsed]: Filed February 3, 1961.

[Title of District Court and Cause.]

No. 4959

NOTICE OF POSTING CASH BOND

Comes now, the First Federal Savings and Loan Association of Bremerton, and does hereby give Notice of Posting Cash Bond in the sum of two hundred fifty dollars (\$250.00) for an appeal in the above-entitled court.

That said cash is hereby posted as a condition to secure the payment of costs if the appeal is dismissed and the judgment affirmed, or of such costs as the appellant court may award if the judgment is modified. This bond to remain in full force and virtue until the final determination of the appeal in the above-entitled matter.

/s/ MARION GARLAND,
GARLAND & BISHOP,

Attorneys for Defendant, First Federal Savings &
Loan Assn.

[Endorsed]: Filed Febuary 3, 1961.

In the District Court of the United States, for the
Western District of Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, et ux.,
FREDERICK D. HOLBROOK, Trustee in
Bankruptcy of James E. Comrada, FIRST
FEDERAL SAVINGS & LOAN ASSOCIA-
TION OF BREMERTON,

Defendants.

No. 4923

EARL L. SANDS and RITA D. SANDS, Husband
and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS

* * *

EARL L. SANDS

upon being called as a witness for and on behalf
of the plaintiff, and upon being first duly sworn,
testified as follows:

Direct Examination

By Mr. McAteer:

Q. State your name and spell your last name.
The Court: Just a moment, please.

(Testimony of Earl L. Sands.)

(Whereupon there was a brief pause.)

The Court: Very well.

A. Earl L. Sands; S-a-n-d-s (spelling).

Q. (By Mr. McAteer): And your residence?

A. Bainbridge Island.

Q. And your occupation? A. Contractor.

Q. Do you have any other occupation?

A. Yes, I am a restaurant operator right now.

Q. When was the last time you actively engaged in the contracting business?

A. During 1956 and 1957. The building of the building on Bainbridge Island was the last.

Q. Are you acquainted with James Comrada?

A. Yes. [15*]

Q. How long have you been acquainted with Mr. Comrada?

A. Oh, I have known of him and him for quite a number of years.

Q. 1950?

A. Oh, prior to that I knew of his family, yes. They come from logging camps where my family originally came from.

Q. Did you ever have any conversation with Comrada concerning a post office at Winslow?

A. Did I have what?

Q. Conversations with Mr. James Comrada.

A. In regards to building it?

Q. In regards to the post office in general?

A. Yes, I have them.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Earl L. Sands.)

Q. When were those conversations, the earliest date?

A. The earliest date would have been probably in January of 1956.

Q. Did he ever contact you at any time prior to that? A. Not that I recall.

Q. In January of 1956, did Comrada tell you that he had a contract to build a post office on his property at Winslow? A. No.

The Court: He had a contract?

Q. (By Mr. McAteer): That he had a contract to build a post office at Winslow?

A. No, he didn't.

Q. What did he tell you? [16]

A. What did he tell me?

Q. Yes.

A. I don't recall the date but it was during the period of time that he asked me to bid on a building for him that was—I don't remember the exact conversation but it was to be drawn—built to specifications that he would furnish me to bid on.

Q. Did he—what did you—did you tell him that you would submit a bid?

A. Yes, he came over and I made out the bid right there and he brought it back with him.

Q. Is it true that your original estimate of construction cost on the plan shown to you by Comrada was \$18,500.00 or \$19,000.00?

A. I believe that is correct. I don't have the exact figures.

Q. Is it a fact that Comrada told you he was

(Testimony of Earl L. Sands.)

in danger of losing his agreement with the post office if he couldn't show that construction would be performed by a reputable contractor?

A. Well, I don't recall him telling me that. I know there was quite a bit of pressure on me to get it built. Just what conversation there was about it, I don't know.

Q. Confining your remarks to prior to the time you entered into any written agreement with Comrada.

A. Prior to the time of the writing of it? [17]

Q. Yes. A. Yes, there was.

The Court: There was what?

The Witness: There was talk of losing his bid for a lease.

Q. (By Mr. McAteer): What was the reason for him losing the lease, if you can recall?

A. There was two items.

I believe Number 1, that financially he didn't have the money; and Number 2, that the date of the opening of bids had already passed. That was on a Friday and this, I believe, was just two days prior.

The Court: When did this conversation take place; in January, 1956?

The Witness: Yes.

Q. (By Mr. McAteer): Is it true you agreed to lend your name to Comrada so that the post office would reinstate Comrada's contract?

A. No, it was for the purpose of the bid, or it was to get the bid in. At that time there was quite

(Testimony of Earl L. Sands.)

a bit of controversy going on between Winslow and the village.

Q. Handing you Government's Exhibit 2, what is the bid price? A. The bid price?

Q. Without tax. [18]

A. Without tax, \$16,500.00; with tax, [19] \$17,500.00.

* * *

Q. Mr. Sands, is it true that you spoke to a postal inspector [20] Wohlfram in September, 1956, and that you told Mr. Wohlfram that the project had been financed to your satisfaction and that you would commence construction within a few days?

A. I don't recall the dates. I have seen Mr. Wohlfram many times but I don't recall the conversation. It has been some time ago.

Q. Subsequent to the execution of Government's Exhibit 2 and prior to the time that any work by yourself had been started on the building?

A. Well, there were several meetings between myself and Earl Wohlfram on Bainbridge Island before actual construction of the building was started but just what that conversation was, I don't recall.

Q. It is a fact that Mr. Wohlfram told you that Comrada had an agreement to lease the property to the post office and that your contract was for construction of that building?

A. That I—that Wohlfram told me there was—that he had a lease?

(Testimony of Earl L. Sands.)

No, there was never anything mentioned of a lease at all. In fact, that is the one thing that they kept pressuring me to build for, was the fact if I didn't get it built—they were pressuring me with the fact if I didn't get it built, they wouldn't—

Q. (Interposing): But they didn't speak about a proposal to lease which was accepted by the post office? [21]

A. I don't know whether it was accepted or not—I know they were speaking of a proposal to lease—nor did I ever see the document. I wouldn't know whether that was what they were referring to or not.

Q. Is it not a fact that after signing Government's Exhibit No. 2, you consulted your attorney, Mr. Jamieson, and he advised you that the informal arrangement between yourself and Mr. Comrada, whereby Comrada or some other person would perform the actual construction, could not—would not protect you and that you were obligated under that contract?

A. I don't remember. I sent to my attorney, yes. I remember that because I figured I needed more than a blank contract that I had here. I had never done any work with the federal government before, or even where they were mixed up in it, and I didn't know what I was doing.

Q. Is it not a fact that in your consultation with your attorney, Mr. Jamieson, that it was decided that the agreement, Government's Exhibit 2, was inadequate to protect yourself and that it

(Testimony of Earl L. Sands.)

would be more appropriate to draw up a more extensive agreement so as to more clearly define your duties and obligations and Mr. Comrada's duties and obligations?

A. I don't recall all the stuff that brought me to go to my attorney but I know it was quite involved and I know it [22] took an attorney to work on it. It was more than just this.

Q. Handing you Government's Exhibit 3, a contract dated May 23, 1956, that is the contract that superseded the original contract, Government's Exhibit 2, is it not?

A. Yes, I believe so. [23]

* * *

Q. Is it not a fact that in July, 1956, you applied for a mortgage loan with the First Federal Savings and Loan Association of Bremerton?

A. I don't recall the date but I did apply for a loan.

Q. Is it not true that when asked by Miss Sprague or Mr. Burmaster of the First Federal Savings and Loan Association whether there was a lease on the property to be mortgaged, you told the prospective mortgagee's agent that Comrada was leasing that portion of the property known as the restaurant property but that there was no other lease on the property?

A. That he was leasing the restaurant portion?

Q. Yes.

(Testimony of Earl L. Sands.)

A. And that there was no other lease on any other portion of the property? [27]

Q. Yes.

A. I don't think I even referred to leases. Comrada was still in the building at that time and I had it leased to him.

Q. When you say "building," you mean which building?

A. Which was originally just the restaurant building, the restaurant portion of the building.

Q. And is it a fact that you did not tell the mortgagee that your predecessor in title had entered into a proposal to lease agreement with the Post Office Department or any details concerning your knowledge of Comrada's agreement with the post office?

A. I had no knowledge of his agreement with the post office; therefore I couldn't have related anything to them.

Q. You did not tell the bank that this post office was being built pursuant to a proposal to lease agreement with the post office?

A. I think it was quite well known that there was a proposal to lease but I didn't tell them that there was a lease. There is no lease.

Q. It is a fact that you did not even mention to the bank that there was a proposal to lease?

A. Well, I don't recall whether I did or not, to tell you the truth. It has been quite a number of years ago and I don't even recall the conversation with the bank other than to make the loan.

(Testimony of Earl L. Sands.)

and in making the loan they go out [28] and investigate and if the loan goes through, it goes through.

Q. At the time of accepting the deed from Comrada, Government's Exhibit 4, dated May 23, 1956, did you inquire of Comrada or ask Comrada to show you his proposal to lease agreement?

A. At that particular time I don't recall whether I did or not. I could have. However, I doubt very much I did, otherwise he might have—no, I don't think I did because I wasn't concerned at that time with what his dealings with the Postal Department were. However, like I say, I could have asked him but I doubt that I did because it was actually no concern of mine. [29]

* * *

Q. Prior to that date had you discussed with Mr. Comrada any terms about a bid to lease or anything of the sort that he had with the United States Post Office?

A. Not for a bid to lease. For specifications, I thought you were referring to. I was after specifications to go along with this set of plans but not so far as his business he had with the [31] government.

Q. And did he—then he never informed you at any time of any binding agreement he had with the government? A. No.

Q. But your understanding was that this building was being built for use by the government, wasn't it?

A. Yes, that was my understanding. [32]

(Testimony of Earl L. Sands.)

* * *

A. I don't recall any of a proposal—recall any lease.

Q. Now, when you were conferring at the bank and applying for a loan you say you don't remember whether you said anything to the bank about a proposal to lease; do you recall whether or not that matter ever came up?

A. Whether the matter of proposal to lease came up at the bank?

Q. Yes. A. No, I don't think so.

Q. But you definitely told the bank that there was no lease?

A. Yes, that there would be no lease unless I completed the building and then—unless Jim Comrada completed the [36] building.

* * *

Redirect Examination

By Mr. McAteer: [37]

* * *

Q. You knew there were other documents relating to the property which Comrada had which he did not disclose to you prior to May 23, 1956?

A. Well, I wouldn't say I knew there was other documents. I knew there was something more than what I had here to build on.

Q. And yet you accepted the deed without first taking a look at those other documents?

(Testimony of Earl L. Sands.)

A. I just about had to with Earl Wohlfram pushing me all the [38] time and Comrada pushing me. I had all that I had tied up in it and I had no choice but to keep going. [39]

* * *

A. Comrada had done a lot of work on that property as a bowling alley but never as a post office. You see, that was all laid out and had footing forms in it for a bowling alley which I had to take out. Whether Comrada did that himself, I don't know. That was prior to my entering into this agreement.

Q. (By Mr. McAteer): In your best judgment as a contractor, how many months or years prior to the time that you started construction work were these footing forms in place?

A. Oh, quite a number of years I would say. The approximate year I couldn't possibly know but they were in there quite a number of years.

Q. When you made application for the loan at the First Federal Savings and Loan Association of Bremerton, was I correct when I heard you say, in response to a question by Mr. Jamieson, that you told the bank that unless Jim Comrada could complete the building there would be no lease?

A. Like I say, I don't recall that conversation at all, just exactly what took place at the bank. However, taking it from a standpoint of not knowing myself what he was doing, I couldn't very well elaborate on it.

(Testimony of Earl L. Sands.)

Q. Did you discuss with the bank under what arrangement the [40] post office would occupy the building when completed?

A. No, I don't believe so. [41]

* * *

JOHN L. VAN BUSKIRK

upon being called as a witness for and on behalf of the plaintiff and upon being first duly sworn, testified as follows:

Direct Examination

* * *

A. I am the regional real estate manager for the post office department.

Q. When you speak of a region, how many states or what area is included within that area?

A. There are fifteen regions for the post office department [43] across the country and we have the fifteenth region which is Washington, Oregon, Idaho, Montana and Alaska.

Q. How many post office facilities are under your jurisdiction?

A. There are approximately just under two thousand post offices of which approximately between twelve and thirteen hundred of them are rented quarters that are under our control—under my control.

Q. By "rented quarters" you mean first, second and third class post offices?

A. That would be right.

Q. And what are fourth class post offices?

(Testimony of John L. Van Buskirk.)

A. Fourth class post offices are small ones in which the postmaster is given an arrangement in his salary to make his own arrangements. It may be in a drug store or a grocery store and tied in with other businesses in a smaller community.

Q. What is the nature of the post office department's property interests in the twelve or thirteen hundred first, second and third class post offices?

A. They are all occupied on either a leased basis or a month by month rental contract arrangement except in the federal buildings and there are approximately one hundred fifteen of those.

Q. So, over one thousand of them are occupied on a lease or [44] rental basis?

A. That is correct.

Q. What are the activities and functions of a regional real estate manager?

A. Well, as regional real estate manager we have complete charge for the securing and maintenance and the operation of the post office department in any area that has a second—first, second and third class post office. [45]

* * *

Q. Are any members of your staff trained lawyers? A. No, sir.

Q. How do you secure the legal advice necessary for the operation of a regional real estate office?

A. When we have legal problems they are forwarded to the post office department in Washington, D.C., where they are transmitted to the general

(Testimony of John L. Van Buskirk.)

counsel for decision and then they come back through the bureau facilities in Washington and to me for a final decision.

Q. Then, except for minor matters where you may contact the local United States attorney, you refer problems on post office policy to the post office department? A. That is correct.

Q. What activates you in securing new post office facilities?

A. Usually the activating force to get a new—to get a building under way would be an expiring lease or having outgrown our old quarters. Either situation would require that we do something about providing new and larger quarters.

Q. When a need for a new facility is decided upon, is there [46] an established procedure for securing new facilities? A. Yes, sir.

Q. What is that procedure?

A. We have—our operating people furnish us with the size of the site that is required and the size of the building that is required and our next step then is to go into the area and analyze just exactly what might be available and what our best course of procedure might be.

Q. What, in general, are the two typical procedures?

A. We have—our lease procedure pretty much set up is that the preferred way of operating is to get an assignable option on a desirable and suitable site. However, oftentimes there are occasions when perhaps there are other vacant buildings in the

(Testimony of John L. Van Buskirk.)

community or that there may be several very desirable locations and, perhaps, the most desirable not available on a practical site. We would then go to bids, or call for bids, letting anyone that had a site present to us a proposal to lease a building, go in and lease to us on an open procedure.

Q. What procedure was followed in the Winslow situation?

A. The open procedure of going to bid, that requirement that would let the bidder present the proposal to us on their site and on our general layout of the building. [47]

* * *

Q. How are bids called for?

A. When we go to bids for the construction, or for a new unit, we post a notice in the post office and we have a bidder list and we alert the postmaster to what we are doing and have him active in the community in which it is coming out so that anyone he knows or **thinks might be interested in** producing either an investor or a contractor [69] for the building to have him contact the postmaster and the next step is to start out with a rough drawing or what we call a schematic that gives the general outline of the building and the particulars inside as to what partitions may be necessary and toilet facilities and doors and all the important factors that are important to the post office are outlined in this.

This together with all the forms necessary to prepare a bid and a letter of instruction is sent to every

(Testimony of John L. Van Buskirk.)

interested investor or contractor that might want to bid.

Out of that we set up an opening date and on that date, why, all the bids we have received are analyzed and if there is an acceptable bid an award is made over a period after that opening.

Q. Do you have knowledge of whether or not that procedure was followed in the Winslow case?

A. To the best of my knowledge and belief, it was.

Q. How many bids were received, if you know?

A. As I recall there were eight.

Q. And Form 1400 proposals, which is the form upon which government's Exhibit 1 is submitted, are required by post office regulations to be in acknowledged form when submitted?

A. This proposal to lease quarters—in this case 1400, and we still call it that—is a standard form that we [70] use in all our leasing procedures and it is not acknowledged before a Notary Public.

Q. It is not acknowledged in a procedure in your region; nor in any other region?

A. Nor in any other region.

Mr. Jamieson: I object.

The Court: I don't know whether he has knowledge. Is that the basis?

Mr. Jamieson: Yes.

Q. (By Mr. McAteer): Do you have knowledge whether or not the form 1400 is used in other parts of the United States, other fourteen regions?

A. All fifteen regions use the same procedure,

(Testimony of John L. Van Buskirk.)

and the same forms and in the other fourteen regions they do as we do it here; it comes to us as a bid without being acknowledged.

Q. Are you familiar with the number of proposals accepted by the post office department to lease space in newly constructed facilities during the last several years?

A. Yes, sir, I have that tabulation.

Q. How many such proposals were accepted in the years 1953 and 1954 and subsequent years?

The Court: In what area are you speaking of, Mr. McAteer? [71]

* * *

“Can you state in round numbers your best estimate of the number of such proposals that were accepted by the post office department in representative years during the past five or six years?”

A. Well, going back to 1953, 1954, 1955 era, it was approximately something in excess of three hundred buildings a year, brand new buildings, put in existence.

From 1955, 1956 and 1957, it built up until in 1958, and I am speaking of fiscal years, and 1959, I believe we had approximately six hundred each year, brand new buildings and that was almost doubled this past year with new buildings.

Now, I am speaking principally of brand new buildings built to our plans and specifications and accepted on our standard agreement to lease procedure. [80]

Q. (By Mr. McAteer): Generally that proce-

(Testimony of John L. Van Buskirk.)

dure would be identical with the procedure used in the Winslow case?

A. Except that some of our larger buildings, of course, take a fourteen hundred and expand it to cover a larger facility and more complicated construction and other pertinent information.

Q. In your own region can you state in round numbers your best recollection of how many such proposals have been accepted over recent years?

A. Well, we started in and have pretty much built up a program here of increased production along with the over-all pattern. Our earlier period of time there we did not have so many. I believe it was comparatively few, some place between twenty and thirty a year until there came a time, and I believe it was in 1957, that we converted from having postal inspectors do our field work to real estate men and we had a lull. I believe we had a total of ten and after they got onto their procedures and started building up we got into a greater volume of business. There was something around sixty buildings in the four states that we have produced in the fiscal year ending June 30, 1960. That was in the 1960 fiscal period.

Q. What new major facilities are under construction in your region at the present time? [81]

A. Well, I believe that we have quite a few of them under construction.

(Testimony of John L. Van Buskirk.)

Q. (By Mr. McAteer): For example, is there a new facility in Portland, Oregon?

A. Yes, our new Portland major facility was accepted late in June. That is one of the largest buildings in the northwest, something in excess of three hundred sixty-five thousand square feet. There was a total investment of [82] approximately ten million dollars and that doesn't contain the automation and the mechanism that is going into it.

The Court: I think that is another matter.

Q. (By Mr. McAteer): Can you state how the bid was made up and awarded in that case?

A. Bid packets were made up and mailed out to all interested parties and the bids resulted in our getting, I think, eight bids for that major facility. All of those bids, of course, were transferred back to the department.

Q. Were the bids required to be acknowledged?

A. No, sir, there was no proposal to lease quarters acknowledged amongst the bids.

Q. Are you acquainted with the procedure that was used in the developing of the bids and making of awards for the terminal annex in Seattle, Washington, on Fourth Avenue and Third Avenue South?

A. Briefly.

Q. Was the same fourteen hundred bid procedure used in that case?

A. Yes, indeed. There was a proposal to lease quarters that came to us. It was opened in Washington and it was an unacknowledged instrument.

Q. Form 1400, the proposal to lease quarters or

(Testimony of John L. Van Buskirk.)

agreement to lease, provides for the execution of a formal lease at a [83] later time; could you explain to the court when such a formal lease is executed?

A. The proposal is accepted by the post office department and the bidder is made an award of his proposal. He constructs the building and at one of two points the lease is executed, either upon completion of the building, or the moving into the building of the post office department.

* * *

Q. (Continuing): Where the building is built in accordance with an accepted proposal to lease quarters, without substantial change, are the terms of the formal lease always in accord with the accepted proposal to lease, accepted proposals to lease quarters? A. It must be.

Q. The proposal to lease quarters then is a final agreement?

A. The proposal to lease quarters is a definite agreement between a bidder and the post office department that results in a lease being executed under the terms and conditions of the proposal to lease.

Mr. Jamieson: Your Honor, I move to strike the answer of the witness as being a conclusion of law and not a matter of fact.

The Court: Well, insofar as it is a conclusion of law I will disregard it. [85]

* * *

(Testimony of John L. Van Buskirk.)

Q. Is it the practice of the post office department to incorporate into the final lease the same terms as to duration and of a dollar amount of rent as was provided in the accepted proposal?

A. That is correct. [86]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Mr. Van Buskirk, referring to this Form 1400 which I believe is marked as the government's exhibit—plaintiff's Exhibit No. 1—it contains several portions here and I notice here the first page says "Proposal to Lease Quarters" and the second page is page 2 of Form 1400 and then here is "Information for Proponent" and then here is a letter.

This letter is to the Postmaster General from James E. Comrada and Florence Comrada.

This is not part of the Form 1400, is it?

A. This is an amendment, a letter amendment to the 1400 proposal to lease quarters.

Q. I see, and does the 1400 also include a sample lease, is that correct? [87]

A. On the back of the 1400 is a sample lease, yes, sir.

Q. And it is customary that the government does not sign—is it customary then that the bidder should sign the sample lease?

(Testimony of John L. Van Buskirk.)

A. No, not necessarily the sample lease. He signs the proposal to us. There have been many instances when the bidder has acknowledged reading the lease by signing it, but that is actually not making a proposal to us. The proposal to lease quarters should be signed as offering us a proposal.

Q. And it is contemplated then, is it not, that a lease would be signed by the parties upon completion of the building, is that it?

A. The lease is executed upon the completion of the building and the acceptance by the post office department of the building as being completed.

Q. So that the Form 1400 is not the complete transaction to occur between the parties, is it?

A. It is a complete transaction to create the building into existence prior to the execution. It is an agreement to lease to the department. It is a contractual arrangement.

Q. Now, under this proposal to lease quarters, which is Government's Exhibit No. 1, I believe it says here on this one part—it says, “* * * no additional items included * * *” in this letter or the amendment. “* * * at a rental of [88] one thousand five hundred dollars per annum, no additional items included * * *”

What does “no additional items included” mean?

A. No substantial change in the building.

Q. No substantial change in the building?

A. In respect to this proposal to change it from a ten to fifteen year proposal. I mean the change of

(Testimony of John L. Van Buskirk.)

the terms and rent only is the intent of this letter of amendment.

Q. Then when it reads “* * * ten years from date of completion of the building, at a rental of one thousand five hundred dollars per annum, no additional items included * * *” that doesn't have any reference—

A. (Interposing): I beg your pardon, this has reference to the quarters, light, heat and so on.

In other words, Mr.—(pause)—filled out the forms satisfactorily, fuel, heat, light, and it means no other items of that kind are included.

Q. It wouldn't have reference to the fact that if the government wished a change or modification in the plans that the lease not be effective?

A. No, sir, it has no such inference at all.

The amendment to this proposal—the proposal came to us for a ten-year period at fifteen hundred dollars a year. For various reasons it was changed to a fifteen-year proposal with the rental adjusted to fourteen hundred [89] and eighty dollars, I believe, and it was a matter of assisting Mr. Comrada in getting financing but there was no change in the general terms and conditions of any of the proposal except for the term and the adjustment in the rent, which, as a matter of fact, adds out for the twenty-year period as being identical.

Q. Well, now, this proposal to lease quarters does not include all the specifications, does it?

A. Sometimes there are other specifications be-

(Testimony of John L. Van Buskirk.)

yond what come in to the—through this 1400. Oftentimes we have a schematic that shows the general layout of the building and the size of a site we want and it would stipulate many of the important facets. Of course, the schematic or rough drawing—I say “rough,” it is rough only in that it does not fill in the details but it gives the facts pertinent to the post office department in the construction of the building such as tile on the floor and acoustical ceilings, whether or not a wainscoating is installed or painted on, and all those pertinent facts that would relate to the type and quality of the building.

Q. And the person who makes a bid which, if accepted by the government, is only expected then to provide the number of square footage of space provided for in this proposal, is that correct?

A. The general program is one providing that amount of space [90] plus the other specific requirements, specifications that are called for.

Q. So that there could have been other specific specifications then besides what is in this Form 1400 here as stated, being the proposal to lease quarters that was made out with Mr. Comrada in this particular instance?

A. It is possible; it is possible.

Q. Where are the details then supposed to be obtained if not here?

A. They would be furnished to Mr. Comrada in this particular packet that is put out when he indicated an interest in providing the quarters at Winslow.

(Testimony of John L. Van Buskirk.)

In other words, Mr. Jamieson, we don't expect any more than we ask for in furnishing the information that comes to us in the bid packet and we expect the proposal that we get to fulfill all the obligations and requirements of that called for bid that comes to the bidder in a bid packet.

Q. And that is why you make reference to the number of square feet and the size of the building and so forth?

A. That part of it, yes.

Q. Now, subsequent to the completion of a building then, you say that the lease is executed either upon completion or upon moving in by the government, is that correct?

A. The lease is drawn at the time the building is about to be [91] completed, about to be moved into, and is executed at the time it is accepted, inspected and acceptable to the post office department.

Q. Now, you mentioned several buildings since 1953, new buildings, that have been built and proposals to lease that have been accepted by the government when the actual lease was executed. Is it not true that several of them were acknowledged by the lessor?

A. The leases are always acknowledged. It is one of the requirements of the post office department that the lease itself be acknowledged and recorded by the lessor.

Q. Well, now, these proposals to lease don't actually state when the rent is to be paid, do they?

A. They state that it will be on or about a cer-

(Testimony of John L. Van Buskirk.)

tain date, so many days after acceptance of the proposal. There is an area in there of adjustment for the reason that materials and labor supplies and many things would enter into an actual saying of you are going to occupy the building on the 15th day of September and give any one ninety or one hundred eighty days to do it. It is almost impossible to have it to the minute so that there is a leeway in there but there are approximate dates.

Q. There is nothing in the proposal to show whether the rent be paid in advance or otherwise, is there?

A. In the back of your proposal there, Mr. Jamieson, you will [92] find a sample lease and on the sample lease I believe that it says it will be paid monthly.

Q. And it is true, is it, that when the government has the lease executed they require that the lease be acknowledged in the State of Washington?

A. All leases in all fifty states have to be acknowledged and recorded by the bidder or the lessor, or the owner of the premises.

The Court: Is that by virtue of some regulation or do you know?

The Witness: Your Honor, it is a definite policy that it has to be done and whether it is by the Postmaster General's decree or by law, I am not prepared to say.

Q. (By Mr. Jamieson): And it is also a requirement that both husband and wife must join in the proposal, is that correct?

(Testimony of John L. Van Buskirk.)

A. A husband and wife both join in the proposal and join in executing the lease.

Q. If it is required by state law?

A. It is required by the post office department for the same people who offer us the proposal to also execute the lease and by the same token there is also a requirement that husband and wife both execute an agreement to lease and also a lease unless there is a special exception. In [93] other words, if it were you, Mr. Jamieson, dealing with your own separate property and you present your proposal on that basis, it would be acceptable provided it was sufficiently shown that it was your separate property rather than community property.

Q. Doesn't it provide in the lease proposal in states where required by law, wives must join their husbands and vice versa?

A. We make, in addition to that, the procedure of going right on through with both parties.

Q. So, when the Seattle terminal annex was completed, an acknowledged lease was entered into by the parties, is that correct?

A. The Seattle terminal annex was completed and the lease executed and that was acknowledged and recorded. I might make one comment there. The recorded lease on the terminal annex was a short form acknowledgment. I mean by that, it was a recorded instrument that referred to the lease that was executed. Actually, the lease itself was not recorded insofar as the terminal annex.

Q. Now, referring to Government's Exhibit No. 1, proposal to lease quarters, assuming that sub-

(Testimony of John L. Van Buskirk.)

stantial changes in the property which would increase the cost of building and so forth had been required by the Government, the Government could not expect this proposed lease to be binding, [94] could they?

A. The instructions they are given are that no changes will be made without written authority and a definite authority of any changes that are to be made that would affect any change in rent.

* * *

Q. (By Mr. Jamieson, continuing): You informed us about the brand new buildings that have been built and I am asking you how many of them—do you have any knowledge of how many of these buildings are occupied by the government without any written lease agreement or by month to month basis?

A. I don't know whether I understand your question exactly, Mr. Jamieson, but we cannot occupy any building without written documents for our occupying the building. [95]

* * *

The Court: Mr. Garland has asked another question of his witness. This witness has no knowledge as to whether or not an original signed copy was delivered to Mr. Comrada. That is the question.

Mr. Jamieson: The question is still material?

The Court: At least I haven't ruled it otherwise.

(Testimony of John L. Van Buskirk.)

Mr. Jamieson: And his answer was that he had no knowledge?

The Court: That he had no knowledge.

Q. (By Mr. Garland): Now, in July of 1957, up until July, 1957, for the year 1955—I think you took until 1957, 1953 until 1957—[105] how many post offices were constructed under proposal to lease such as Exhibit 1 in Kitsap and Mason Counties, the great peninsula?

A. I will have to check my records in Portland to give you an answer to that.

Q. Do you know whether there were many or not? A. I cannot answer definitely.

Q. I believe you said in the year 1957 there were twenty post offices that were constructed in five states?

A. That was in 1957. There were approximately ten or thereabouts.

Q. Ten? A. Ten.

Q. Ten constructed in five states?

A. In 1957 and the reason I gave was because we were——

Q. (Interposing): Of those ten constructed in the five states in 1957, how many of those were constructed before July?

A. Well, that would be up until July.

Q. Up until July, 1957? A. Yes.

Q. And what particular part of the State of Washington were any of those constructed in?

A. It would be difficult for me to answer that.

(Testimony of John L. Van Buskirk.)

Q. Do you know if any were constructed in the State of Washington? [106]

A. In 1957 I am sure there were but to put my finger on one, it would be difficult to do.

Mr. McAteer: Your Honor, if counsel will be willing to withdraw the previous objection to Exhibit 23, I think the details and statistics would be available.

Q. (By Mr. Garland): Now, you stated you had no occupancies that weren't under lease in the year 1957, where the rental was more than one thousand dollars a year, is that correct?

A. State that question again.

Q. You said you had no rentals in the year 1957 except where it was under lease where the rent was more than one thousand dollars a year?

A. In all of our facilities, and if it is a technical question you are asking me, and interim period—that is one thing, but under a policy of the post office department, that we adhere to, we would not enter into or move into a building of any kind without a definite written understanding of occupancy that would result in a lease if the rental was over one thousand dollars.

Q. Now, what quarters at Winslow did you occupy immediately before you occupied this building which was built pursuant to a proposal to lease which is Exhibit 1?

A. We rented temporary quarters because we forced out of the former post office. [107]

Q. Wasn't that a month to month rental?

(Testimony of John L. Van Buskirk.)

A. That was an emergency arrangement.

The Court: The question was whether it was month to month.

Q. (By Mr. Garland): Well, but it was a month to month rental?

A. If I recall that situation right, it was on a Form 33 which was an emergency use of space. I am pulling that out of the back of my head, sir.

Q. Is a Form 33 a month to month rental?

A. This Form 33 is an arrangement where the post office department can take care of an emergency situation for temporary quarters and many other things for a short period of time.

Q. To refresh your recollection, you did have such a rental before you—immediately before you moved into this building such that you could move out at any time you wished, didn't you?

A. If that was the situation—I do know we were in temporary quarters—it was an emergency situation and we have a provision for such emergencies as that on what we call a Form 33 and I believe it was handled that way.

Q. Now, before the lease is signed officially by your department, it is obligated to pay rent or go ahead on the premises? [108]

A. We pay rent many times under an accepted agreement to lease.

Q. But now, you made the statement that “we require the signature of both the husband and wife and we require that a lease be entered into.” Do

(Testimony of John L. Van Buskirk.)

you have any rules or regulations which state what happens if they refuse to enter into a formal lease?

A. That becomes a legal problem you would send back to general counsel.

Q. You have no rules or regulations covering that?

A. There is no set policy on that. We have had very little experience in that category.

Q. Who, in July of 1957, that was in Seattle or Winslow, would have known of the claim of the United States Government that they might have had a lease; who could inquiry have been made to in the local area?

A. I am sure the postmaster would have been informed.

Q. The postmaster where?

A. That particular community. He is given a copy of all the records, all documents pertaining to properties under his control.

The Court: You mean in this case the postmaster at Winslow?

The Witness: That is right; at that time there was a postmaster at Winslow. [109]

Mr. Garland: I have no other questions.

The Court: Can you expand a little further? I don't suppose you can testify what someone else knew, but under the custom and practice of the post office department, what would the local postmaster, such as at Winslow, know of the transaction?

(Testimony of John L. Van Buskirk.)

The Witness: He would be furnished with all copies of documents relating to his quarters.

The Court: Which would include what?

The Witness: A copy of Form 1400 until there was a lease and when the lease was executed he would receive a copy of that.

The Court: Was there a postmaster at Winslow during 1955, 1956 and 1957?

The Witness: I believe so. [110]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Assuming the postmaster at a local office such as Winslow had this information, is he authorized by the department to give this information out?

A. I don't believe there is any reason why it should be withheld. Anyone inquiring as to the status of any of the business of that kind, I am sure that he would be able to get that kind of information from the postmaster.

* * *

Redirect Examination

By Mr. McAteer:

Q. Calling your attention to the section of Exhibit 1 entitled "Information for Proponents," does that page give details as to the explanation of the terms of the Form 1400 and of other details relating to the proposed lease arrangement?

(Testimony of John L. Van Buskirk.)

A. I believe that this information for proponents pretty much covers the terms and conditions of the progress of the development of the building and the eventualities of it.

Mr. McAteer: I would like to read a portion of that, your Honor. Paragraph 7 on that page reads as follows: [111]

“Leases must be recorded at the expense of the lessor.”

That is the portion that I wanted to call to the court’s attention and call to the witness’ attention.

Q. (By Mr. McAteer): Is it your testimony that the formal leases that are entered into after the acceptance of the property by the post office must be acknowledged, generally referring to the fact that those leases are recorded under normal state procedure?

A. They are recorded. I don’t understand what you mean by “state procedure.” They are recorded as a matter of requirement of the post office department by the Clerk in the County in which the facility is built.

Q. They are recorded under a State recording system and not any so-called federal recording system?

A. No special system. It is whatever county or state facilities there are for making the lease a matter of record for anyone to consider insofar as the title to the property is concerned, yes.

Q. Then, if local law permitted the filing or re-

(Testimony of John L. Van Buskirk.)

ording of a lease without acknowledgment, that would be sufficient?

A. No, sir, our instructions are still to execute a lease by the parties that make us the proposal, or subsequent owners, and to have their signatures acknowledged and to [112] have it recorded in the county in which the facility is located.

Q. That is a uniform practice?

A. That is a uniform practice.

Q. Such practice is not, however, required for the proposal to lease, 1400?

A. No, sir, that is not a recorded instrument.

* * *

Recross Examination

By Mr. Garland:

Q. Did the post office department know at the time they took occupancy of the building that there was a mortgage against it in favor of the First Federal Savings and Loan Association?

Mr. McAteer: It is covered in the pre-trial order, your Honor.

A. I believe it is a matter of—

The Court (Interposing): What part?

Do you want to answer the question?

A. (Continuing): I believe there was knowledge at the time, it was known at the time. I am not positive of the date [113] in there. [114]

* * *

EARL A. WOHLFROM

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Earl A. Wohlfrom, W-o-h-l-f-r-o-m (spelling).

Direct Examination

By Mr. McAteer:

Q. Mr. Wohlfrom, will you state your residence?

A. Seattle, Washington.

Q. Your street address?

A. 3836-46th Avenue Northeast.

Q. Your occupation? A. I am retired.

Q. From what occupation are you retired?

A. As a postal inspector.

Q. When were you retired?

A. June 30, 1957.

Q. How many years did you work for the post office department?

A. Forty-seven years and a few months and days.

Q. What department of the post office were you principally engaged with? [129]

A. Well, I was in the inspection service. [130]

* * *

Q. (By Mr. McAteer, continuing): Mr. Wohlfrom, do you have any knowledge of whether or not information would have been available to a person

(Testimony of Earl A. Wohlfrom.)

making inquiry at the post office, in Seattle, Washington, concerning the nature of the post office's interests in the building under construction on James Comrada's property at Winslow, Washington, during the year 1956?

A. Well, information would always be available in my office, yes.

The Court: To anyone who might make inquiry, to any member of the public?

The Witness: No, to interested parties, yes, sir.

Q. (By Mr. McAteer): By "interested parties," a person who could establish some [133] basis for——

Mr. Garland (Interposing): I object to the leading question. If he wants to ask who are the interested parties, fine, but to tell him who they are—I think this witness should testify.

Q. (By Mr. McAteer, continuing): What was the post office—who would the post office consider an interested bidder to whom the information would be available?

A. Well, the successful bidder would be the one who would be entitled to all that information.

Q. Would any other parties be entitled to the information, such as a banker? [134]

A. If he had an interest or was interested in that property it would be available to him. That is, in the manner of financing of it, I understand you to say.

Q. Then it would be correct to say that if a banker or a person from any other financial institu-

(Testimony of Earl A. Wohlfrom.)

tion who was contemplating entering into a transaction affecting that property, and inquiring about the post office's interest in that property, would that person be interested—an interested party, and be entitled to that information? A. Yes, sir.

Q. Do you know—state whether or not you know if similar information was also available locally at Winslow, Washington?

A. No, I don't believe it would be.

Q. Would the local postmaster have any information?

A. He would have some information, but the local postmaster would refer any inquiries to him probably to the inspector handling the case.

Q. The inspection service at the primary responsibility for the handling of leases?

A. Yes, sir.

Q. In your contact with Mr. Sands in the construction of the building, did you make available to Mr. Sands such information as he requested?

A. That is right. [135]

Mr. McAteer: Mr. Jamieson, you may inquire.

Cross-Examination

By Mr. Jamieson:

Q. You don't know as a matter of fact, do you, Mr. Wohlfram, actually, about the delivery of the instruments?

When you were referring to the delivery you said, I believe, you get one copy, is it?

(Testimony of Earl A. Wohlfrom.)

A. Yes, sir.

Q. That is the usual procedure?

A. That is right.

Q. But you couldn't say as a matter of fact that in this particular instance it was done; you don't know of your own knowledge, do you?

A. I received a copy.

Q. You received a copy? A. Oh, yes.

Q. But you don't know about the other copies?

A. I wouldn't know. That is the postmaster's responsibility to deliver that.

The Court: The postmaster, the local postmaster?

The Witness: The local postmaster. He delivers it and obtains the bidder's signature which is returned to the department.

Q. (By Mr. Jamieson): Now, when you talk about interested parties, [136] you mean if any bank should come to you and say they were interested in financing, that you would give them the true information as regards this?

A. I would if I was satisfied that they were an interested party. In other words, just a casual inquiry by some financial institution, I would want to be certain first before giving any information that they were actually interested. That would be done normally through contact with a successful bidder.

Q. And so in general then the information, so far as the post office policy is concerned, is that this information belongs to the successful bidder?

(Testimony of Earl A. Wohlfrom.)

A. Yes, sir.

Q. And not anyone else unless the successful bidder says they should have the information?

A. That is right.

Q. So in your dealings then with Mr. Sands you felt he should get all this information from Mr. Comrada, the successful bidder, is that right?

A. Well, yes. Mr. Sands was the contractor and he was entitled to such information as he needed.

Q. Now, you said that the building at Winslow was substantially completed in accordance with these plans, is that correct?

A. That is right. [137]

* * *

Cross-Examination

By Mr. Garland:

Q. How soon after you started dealings with Mr. Comrada did you realize he would need financing?

A. Well, I couldn't say other than I knew that the start of construction was being delayed, and there must have been—it must have been over a couple of months, maybe, and nothing had been done, and then I began to get a little concerned about it.

Q. Did you at that time inquire of Mr. Comrada what the delay [148] was and did he tell you it was financing? A. That is right.

Q. And you knew he would need outside financing for the building even before construction was begun, didn't you?

(Testimony of Earl A. Wohlfrom.)

A. Well, I learned that after his proposal was accepted. He gave me to understand that he was amply financed for the construction of the building.

Q. But before the ground was broken for the construction you then learned he was mistaken?

A. That is right.

Q. And that he would need outside financing?

A. That is right.

Mr. Garland: I have no other questions.

Redirect Examination

By Mr. McAteer: [149]

* * *

Q. You said in answer to a question by Mr. Jamieson that an interested party would include a person who was designated by the successful bidder, such as a bank or financial institution who was designated by the successful bidder.

A. As his legal representative, yes, he would be entitled to the information—or agent.

Q. Would that also include a bank who was—had received an [150] application for a loan from the successful bidder? A. Yes, sir.

Q. And also would include a person who had made application for a loan being a successor, that is, one who received a deed from the successful bidder, the successful bidder having sold out?

A. Yes, sir.

* * *

(Testimony of Earl A. Wohlfrom.)

Recross-Examination

By Mr. Garland:

Q. You still maintain your previous statement, however, you would expect the financier to get his information either from the successful bidder or the assignee of the successful bidder?

As I understood your testimony, you said you would expect inquiry to come from the person who had received the bid, or one who stood in his place, so far as the [151] financier?

As I understood your testimony in chief, you said that you would expect inquiry to come from the person who had received the bid, or one who stood in his place, so far as the financier was concerned, and I took it from that to mean that if somebody came to you to see about financing the place you would have expected him to have been seen by the bidder?

A. Well, I would say that ordinarily I would know that the successful bidder had informed me he was negotiating a loan with a certain institution and if that institution then asked me for information, I would give it to them.

Q. And you would expect that to originate—before you had authority to give that information out to have originated from the bidder himself?

A. That is right.

(Testimony of Earl A. Wohlfrom.)

Further Redirect Examination

By Mr. McAteer:

Q. Mr. Wohlfram, assuming that the successful bidder had contracted to have the property built by a contractor, and assuming that the contractor had acquired a deed to the property from the successful bidder as security for the cost of construction, but prior to the time that the contractor told you of the deed or that the contractor [152] went to an institution and applied for a loan, if that financial institution inquired of the post office that they had been advised that a post office building was under construction on a certain piece of property and that they desired information whether or not the post office had any documents or any other interests that would—that related to that property, would such information be available to the agent from the financial institution? [153]

* * *

A. Yes, sir, it would. [154]

* * *

EMILY A. SPRAGUE

upon being called as a witness for and upon behalf of the defendant, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Emily A. Sprague, S-p-r-a-g-u-e.

Direct Examination

By Mr. Garland:

Q. What is your name, please?

A. Emily A. Sprague.

Q. Where do you live, Mrs. Sprague?

A. 958 Silverdale, Bremerton.

Q. And what do you do for a living?

A. I work with the First Federal Savings and Loan Association. I am the assistant secretary and also the loan secretary of the organization.

Q. And what position did you hold with that company on July 25, 1956?

A. I was the assistant secretary and the loan secretary. [160]

* * *

Q. Did the processing that you did have anything to do with title insurance?

A. Yes, sir.

Q. And what did you do?

A. After the loan application was approved I ordered out what we call an ATA title insurance from one of the local title companies.

Q. Did you make a loan in July, 1956, to Mr.

Sands? A. We did.

(Testimony of Emily A. Sprague.)

Q. In that particular case did you get a loan policy? A. Yes.

Q. Did that policy have any information concerning an interest of the government in the property on which you made the loan? [161]

* * *

A. It did not.

Q. (By Mr. Garland): Did your record show what type of structure was being built on the premises at the time you made the loan?

A. It showed that a building was being put up that could be used for a business building or the use of a post office or any commercial building.

Q. And during the—did you receive—have you made—you made a loan at that time, your institution? A. That is right.

Q. And what was the amount of that loan?

A. \$21,000.00.

Q. And what since happened to that?

A. We have since foreclosed the mortgage and received our [162] certificate, sheriff's certificate of sale subject to retention.

Q. And the date of that certificate of sale?

A. March 25, 1960.

Q. And since March 25, 1960, who has been in possession of the premises?

A. Mr. Sands has been in possession of the one portion and the post office has been in possession of the other portion.

(Testimony of Emily A. Sprague.)

Q. Have you received any rental for the portion that is in the possession of the post office?

A. No, sir.

Q. Have you received any tender of rental?

A. No, sir.

Q. Have you made a demand for rental?

A. Yes.

Q. And how much did you demand?

A. \$330.00 a month.

The Court: What was that last question?

(Whereupon, the following was read by the reporter:)

“Question: And how much did you demand?

“Answer: \$330.00.”

Q. (By Mr. Garland): Did you receive any counter-proposal of any kind?

A. No, sir. [163]

Q. At the time you made the loan on the premises did it show whether or not there was any occupancy of the premises?

A. There was no occupancy on the portion of the new construction.

Q. Which is now occupied by?

A. By the post office.

The Court: Did you observe it yourself?

The Witness: No, sir. The title company and our president——

The Court: I think there is an exhibit on that, isn't there?

Mr. Garland: There is an exhibit on that, and

(Testimony of Emily A. Sprague.)

it is also in the admitted statement of facts. However, in the appended facts I also brought it out again, but it is admitted there was no occupancy at the time they made the loan.

The Court: I understood the inspection was made by someone other than the witness, and I didn't know whether she was qualified to testify to that unless she observed it herself.

Q. (By Mr. Garland): The record showed that?

A. Yes, sir.

Q. What did they show as to occupancy at the time?

Mr. McAteer: I will object to the whole line of [164] inquiry unless counsel can indicate in what particulars it bears on Paragraph 25 of the admitted facts, and also as to any issue.

Mr. Garland: Exhibit 22 that you presented, I didn't object to, but it has never been identified. If I can have Exhibit 22 I will have her identify it.

Mr. McAteer: It speaks for itself as far as the government is concerned.

Q. (By Mr. Garland): Mrs. Sprague——

The Court: Is it admitted?

Mr. Garland: It is admitted.

Q. (By Mr. Garland): ——showing you Exhibit 22, is that the record you went by?

A. Yes, it is. The record of Mr. Rosenbarger's inspection of the property.

The Court: You might bring out who he was.

Q. (By Mr. Garland): Now, did you have any

(Testimony of Emily A. Sprague.)

actual notice as to whether or not the government had a lease on the premises?

A. We had no notice.

Mr. McAteer: Objection to the interpretation of the question, that it calls for a legal conclusion.

The Court: Well, you might substitute the word "knowledge" instead of notice. [165]

Q. (By Mr. Garland): Any knowledge?

A. We had no knowledge.

Q. Did you have knowledge as to whether or not there were post offices in the Kitsap County area that did not have leases?

Mr. McAteer: Objection.

Mr. Garland: I asked her whether she had the knowledge or not, your Honor.

Mr. McAteer: I fail to see the materiality of the question.

The Court: Objection overruled.

Q. (By Mr. Garland): Did you have any knowledge?

A. It was my understanding——

Q. Did you have—yes or no—did you know whether or not there were?

A. I know of one that does not have.

Q. You know of one? A. Yes.

Q. Now, I will ask you that question: Of the one of which you know, did it or did it not have a lease? A. It did not have a lease.

Q. And where is that one located?

A. It is located at Silverdale. [166]

Q. Did your institution have a loan on that?

(Testimony of Emily A. Sprague.)

A. We have a loan on it, yes.

Q. How far is Silverdale from Winslow?

A. I would say about fifteen miles.

Q. Are they both considered in the north end of the county? A. Yes, sir.

Q. What is the comparison in your opinion as to the size of the community?

A. I would say the communities are about the same size.

Mr. Garland: I have no other questions.

The Court: I take it you have none, Mr. Jamieson?

Mr. Jamieson: I have none, your Honor.

Cross-Examination

By Mr. McAteer:

Q. Mrs. Sprague, how much rental is received from the restaurant property at the present time?

A. \$158.00, which is——

Mr. Garland: Don't add anything. Just answer the question.

The Court: \$159.00?

The Witness: \$158.00 a month.

Q. (By Mr. McAteer): Is the restaurant property—are the dimensions of the restaurant property as shown on Plaintiff's Exhibit 22 [167] approximately correct? A. Yes, sir.

Q. Is it approximately of the same quality construction as the post office?

A. I understand it is.

(Testimony of Emily A. Sprague.)

The Court: You say "approximately"; what is that, the same size?

The Witness: The same standard, yes.

Q. (By Mr. McAteer): Does that include all the counters and fixtures in the restaurant?

A. No, sir.

Q. You stated that you had knowledge of month-to-month tenancy of a post office at Silverdale. Do you have knowledge of any post offices in any other portions of the State which do involve leases?

A. Yes, I understand that the Poulsbo post office has a lease.

Q. Was that your understanding in July, 1956?

A. I did not know at that time.

Q. You made no inquiry of any other post offices in the Kitsap County area or any other area concerning the tenancy of the post office in those communities prior to accepting this loan?

A. No, sir.

Mr. McAteer: No further questions. [168]

Redirect Examination

By Mr. Garland:

Q. Mrs. Sprague, how did we arrive at the figure of \$158.00 a month to charge the restaurant that Mr. Sands owns?

A. That figure was arrived at——

Mr. McAteer: Object to the question as not material.

Mr. Garland: It is material.

(Testimony of Emily A. Sprague.)

Mr. McAteer: I will withdraw the objection.

A. (Continuing): That amount was arrived at by figuring what our taxes, fire insurance and miscellaneous upkeep of the building would be providing Mr. Sands did not redeem and inasmuch as he had the right of redemption we kept it at a figure just sufficient to cover our taxes and insurance and various items.

Q. (By Mr. Garland): You figured no capitalization? A. No capitalization whatsoever.

Mr. Garland: I have no further questions.

Recross-Examination

By Mr. McAteer:

Q. Could you provide the same figure as to the taxes, fire insurance and miscellaneous upkeep required by the post office department for the period March until today?

A. I couldn't without checking through the office. [169]

Q. Would that be approximately the same as the \$158.00? A. No, they would run more.

Q. What factors are involved in the post office property that are not involved in the restaurant property that would cause the expenses to be greater?

A. Your taxes are more, and there would be a difference also in your insurance premium.

Q. Wouldn't it be more reasonable to say that it would be less because there is not the cooking or hazardous activity going on in a post office that

(Testimony of Emily A. Sprague.)

may be occurring in the restaurant, that would make the fire insurance premium less for a post office as compared with a restaurant?

A. The premiums do run more on the post office, as I remember the rate. The rate is a higher rate. I don't know why, but under the policy, as I recall, the rate on the post office is higher.

Q. Would the difference on the rate be ten per cent or one hundred per cent?

A. I wouldn't know without rechecking my files at the office.

Q. By your acquaintanceship with the files, would your opinion, your best recollection would be it was closer to ten per cent than one hundred per cent?

A. That is right, so far as the insurance is concerned. [170]

* * *

You say in determining the rental to be charged for the restaurant portion it included taxes, insurance and fire insurance and upkeep and, anything else?

The Witness: Miscellaneous bookkeeping cost in taking care of the account.

The Court: And no return on capital at all?

The Witness: As I recall, there wasn't any.

The Court: Very well. One other question. You indicated your knowledge with respect to the Silverdale post office as being occupied without a lease. Did you have that knowledge at the time you made this loan in 1956?

(Testimony of Emily A. Sprague.)

The Witness: I am—I couldn't say definitely at what time I did receive that knowledge, did get the information.

The Court: So that you may not have known it in 1956 when you made the loan?

The Witness: That is right.

The Court: Very well, that is all. [171]

* * *

Further Cross-Examination

By Mr. McAteer:

Q. Mrs. Sprague, is it true that the bookkeeping costs that were figured in the calculations in arriving at the \$150.00 a month rental on the restaurant property included a six per cent return on the portion of the loan applicable to the restaurant?

A. That is true. It also included the monthly payment for the assessments.

The Court: It includes what?

The Witness: The monthly payments for the assessments against the property.

The Court: The local improvements?

The Witness: That is right.

Mr. McAteer: No further questions.

The Witness: All right.

The Court: A six per cent return on [173]
the——

* * *

(Testimony of Emily A. Sprague.)

Further Cross-Examination

By Mr. McAteer:

Q. The original loan of \$21,000 was broken down \$8,445.88 to the post office and \$12,454.12 to take up the mortgage on the—the prior mortgage on the restaurant? A. Yes, sir.

Q. As disclosed by the application for a loan, a portion of Exhibit 22, is that correct?

A. Yes, sir.

Q. So that the judgment of foreclosure, including cost of foreclosure and other fees, as disclosed by Defendant's Exhibit B-1 of \$22,955.27 would be these original figures of \$12,454.12 on the restaurant property, plus a pro-rata portion of the difference between \$21,000 and \$22,955?

A. That is right, and there would also be taxes and assessments that have been added to the balance.

Q. So, in round figures, the 6% would be based on \$14,000?

A. I believe that that was—I would have to have our actual accounting records to be sure.

Mr. McAteer: Thank you. No further questions.

(Witness excused.) [178]

ARNOLD H. BURMASTER

upon being recalled as a witness for and on behalf of the defendant, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Garland:

Q. Would you give the court your name, please?

A. Arnold H. Burmaster.

Q. Where do you live, Mr. Burmaster?

A. 1341 Trenton Avenue, Bremerton, Washington.

Q. What is your business?

A. I am an independent fee appraiser.

Q. And would you give us your qualifications, as you see them, for being an independent fee appraiser? A. I have——

Mr. McAteer (Interposing): We will admit his qualifications as given in his report.

Mr. Garland: All right.

Q. (By Mr. Garland): So that we will follow your testimony, would you tell us what Exhibit B-1 is?

The Clerk: B-2.

A. Is that this book?

Mr. Garland: Yes. [179]

A. This is an appraisal report on the—of the Post Office Building at Winslow, Washington.

Mr. Garland: In order to follow this witness' testimony, for purposes of illustration, I would like to offer B-2, I have given copies to other counsel,

(Testimony of Arnold H. Burmaster.)

not for the truth of what is in it as the truth, but for the purpose of illustrating his testimony.

Mr. McAteer: The Government has no objection to the admission of the exhibit for the purpose as indicated in the offer.

The Court: Very well, it may be admitted for such limited purpose as it is offered.

(Defendants' Exhibit B-2 admitted in evidence.)

Q. (By Mr. Garland): Did you at the request of the First Federal Savings & Loan Association make an appraisal for rental value of the Post Office Building at Winslow, Washington, recently?

A. I did.

Q. And in your preamble sheet to Exhibit B-1*—that is the sheet just before Sheet 1—did you make a report and did you have a report as to what the fair rental value of that building is?

A. Yes, \$290.00 monthly.

Q. In following the exhibit and turning to Page 1, would you [180] go through your report page by page and explain what each item is and what you considered in coming to your appraisal of \$290.00 per month?

A. Commencing at what page?

Q. Page 1, and will you say what Page 1 shows for the Judge?

A. Page 1, the first photograph shown is a gen-

*Exhibit B-2.

(Testimony of Arnold H. Burmaster.)

eral view of Winslow Way looking easterly from the intersection there. I have forgotten what that street is.

The next photograph is looking northerly at the east side of a portion of the front of the Post Office Building. It also shows the east side of the building and the highway, the blacktopped driveway.

Number 3 is looking at the front of the Post Office Building, looking northeasterly. Now, the division is there shown by a mark in the center. It should be—there is a projection line of the wall that comes out. From that line to the right would be the Post Office Building. There is a sign or a flag on the Post Office Building there.

Next is looking northeasterly at the west side of the coffee shop building adjoining the post office.

Number 5 is looking northeasterly at the rear of the post office.

Q. Do you mean southwesterly?

A. I mean southwesterly. It says "Southwesterly," and that [181] is what it is.

Q. Go ahead.

A. Page Number 4 is a sketch of the post office property—29, the lot is 29x192 feet. It also shows 11.5 feet easement on the right-hand, or east side. That is looking northerly from the bottom of the page.

Q. All right. Now, in making your appraisal did you take into consideration the value of the building, the construction value of the building?

A. Yes, I did.

(Testimony of Arnold H. Burmaster.)

Q. What value did you place on the land value?
It appears on Page 8—

A. The land value—the land and land improvements I valued at \$6,807.75.

Q. And did that include the blacktopping?

A. That included the blacktopping, yes. Without the blacktopping it was \$362.50 less, so the bare land would be \$6,445.25.

Q. Now, did you consider the value of the building?
A. Yes, I did.

Q. And what did you figure to be the replacement—Page 10—what did you figure to be the replacement cost of the building?

A. The replacement cost is \$28,228.

Q. How old is the building? [182]

A. Three years, as near as I know, as given me by the owners.

Q. And did you then figure the present-day value?

A. Yes. I took the full depreciation over a period of fifty years and the building is three years old, so that I took 6% of that as the current depreciated value, and that 6% is for physical depreciation and not for any other depreciation. As to general physical deterioration, I think that would just about cover it.

Q. What value then did you place on the building as of now?
A. As of now, \$26,534.32.

Q. And does that show you took into consideration the cost of completing the building, such as taxes and insurance?

(Testimony of Arnold H. Burmaster.)

A. Page 11, yes. This is taken from the Assessor's records at Port Orchard. The land valued at \$600; improvements at \$3,210, and the total assessed value at \$3,810.

The 1960 tax is \$217.78.

I would like to include there that in Kitsap County the assessed value is assumed to be 20% of the value of the property, for what that may be worth.

Q. It is the assessor's opinion?

A. It is the assessor's opinion, and sometimes it fits and sometimes it doesn't, in my opinion, and experience.

Insurance carried on the building at this time is a policy dated July, 1959, for \$16,000 with a three-year rate of \$26.08, making a total of \$17.28, or one year [183] would be \$139.09.

Q. What type of rental property is this? What is it considered as?

A. What it could be used for, is that what you mean?

Q. Yes.

A. Well, it is a multi-purpose building. It could be used for its present use, or it might be used for any other retail merchandising; possibly services of some kind.

When I speak of services, it could even be a doctor or dentist. It is not ideal for that, but particularly merchandising of any kind, or repairing of televisions, or things of that nature.

(Testimony of Arnold H. Burmaster.)

Q. The use to which it is now put, would you say that is a good use for that building?

A. Yes, I would say so.

Q. What other approaches to arrive at your \$290.00 a month did you use in considering whether or not that was a fair appraised rental?

A. To arrive at a fair rental value it takes an amount that would compensate for the expenses and interest on the investment and a return of the investment on a straightline capitalization, and from that, according to my estimate, it requires approximately \$290.00 a month to do that, covering my estimate of the expenses and the interest involved in the procedure; so I have developed—in [184] order to do that I have developed——

Q. (Interposing): Where do you set those figures out? What page?

A. Pardon me, on Page 12 it is set up on the capitalization of income approach.

Q. Go ahead.

A. Listed as expenses: Insurance, of course, is at \$139.09; the taxes are \$217.78; maintenance and repair is estimated at \$300.00; and on that particular item a considerable amount has been allotted to an estimated requirement for painting; and the management is \$5.00 a month, or \$60.00 a year in case an individual who owned it would be absent and couldn't collect the rent himself, there probably would be a very nominal charge for collecting and handling the building.

That is the process of justifying this charge; I built up a replacement cost approach of the build-

(Testimony of Arnold H. Burnmaster.)

ing. That is the value of the land by comparable sales and then the cost of the building, replacement cost, less depreciation—would give me the replacement cost less depreciation. That does not define the expenses.

So, in taking that out, that building—my answer to that hypothetical setup is \$33,342.07.

Working the thing out, taking the building and working it out using a \$290.00 a month rental [185] and depreciating—taking the expenses as given and using 6% as interest on the investment and recapitalization of over forty-seven years, I have used three years for depreciation, forty-seven years is slightly over 2%, and that makes a total of capitalized rate of .812. That brings the estimated value of the building to \$26,855.54, and the land, of course, remains the same, \$6,807.75, and in that process, by using \$290.00 a month and taking those expenses off and using the capitalization rate of 6%, I came up with \$33,663.29, a difference of \$521 between the two processes.

Q. Now, your two processes, cost approach and income approach—

A. (Interposing): That is right.

Q. (Continuing): —will come to approximately the same?

A. Very close. It could vary a little bit. \$25.00 more in expenses would bring it almost identical.

Q. In determining what was the fair market value for that rental, did you check other comparative rentals?

A. Yes, I did.

(Testimony of Arnold H. Burmaster.)

Q. What did you find in comparing rentals?

A. Well, I have a correlation there of my comparative sales. I have listed comparative sales.

Q. Will you tell us what they are and why you think they are comparable?

A. The ones that are not too comparable, you can turn through. [186]

Q. You turn through them?

A. You want me to go through them one by one?

Q. Yes.

A. Sheet Number 17 is known as the Kahn Building. That is owned by—the owner of record is—Archie Lippman, but his father, Otto, is on the ground and seems to be in complete control of the property.

That is used as a clothing store and has an apartment above.

The rent given to me on that by the man who is renting the property—there is a little difference in the owner's, but the amount is the same—the apartment rents for \$85.00 and the main floor for \$315.00, making a total of \$400.00 for the building; so that the main floor is 42x100, 4,200 square feet, and that rents at 7½c and amounts to \$315.00.

Q. And how does that building compare in structure, size and location and desirability to the Post Office Building?

A. It would compare favorably to the Post Office Building.

Q. Is it on the same street?

(Testimony of Arnold H. Burmaster.)

A. It is on the same street and has a driveway along the side of it.

Q. And the structure?

A. The structure—it is a well-built building.

Q. And the age is not too different? [187]

A. No; it is a very good building.

Q. On Page 18 what is there?

A. 18 is the adjoining building to this under the same owner. It is leased to Riley's Furniture; 30x88, 2,640 square feet. That per-square-foot monthly rental is \$.0663. That is \$175.00 a month. That is slightly less than one cent a square foot less than the Kahn Building; something like that.

Q. And does that fit into the rental?

A. It does. It is an inside building. There is a pattern for those buildings. They are shorter and smaller, of course.

Q. Take the next building. A. 19.

Q. Page 19.

A. That is Hansen's Electric, and that has 30x88 and 25x88; that is 4,840 square feet, and the total rent is \$330.00, and that is \$.0682 per square foot.

Q. Would you remind us how much is per square foot in the post office at \$290.00?

A. The post office is—

Q. (Interposing): Would you give it to us?

A. Just a second here. \$.10611; \$.16011, that is at \$290.00. You mean the proposed or fair estimated rent rate?

Q. Yes. Page 20 we are on now. [188]

(Testimony of Arnold H. Burmaster.)

A. Page 20, that is rented to Pacific Telephone and Telegraph. It is vacant at this particular time because, for reasons, I presume, of unknown to me they moved to another building, but their lease is still in effect and that rent, Mr. Lippman told me, was higher proportionately than the others because he had to make some special installations that ran a little higher than the other, and that is \$125.00 a month for 16.5x88 feet. That is 1,452 square feet.

Q. And that is also——

A. (Interposing): That is vacant at this time, but he is still getting paid. It is still under lease.

Now, the next one is a drug store building and that is rented by Winslow Drug, and it pays \$260.00 a month. That is 40x88 and contains 3,520 square feet. Now, that works out at \$.0738 per square foot.

Q. Is that an inside building, also?

A. Yes, that is inside. They are all inside except the Kahn is an outside building.

Q. All right.

A. The next one, 22, is the Post Office Building at Poulsbo, Washington.

Q. How far is Poulsbo from Winslow?

A. There is a sign on the top of the hill that says eleven miles; maybe 12½ miles from the Post Office Building. [189]

Q. Are you acquainted with the comparable rents, with the post office rentals in general?

A. I haven't examined those in particular, but in general.

(Testimony of Arnold H. Burmaster.)

Q. In general?

A. They are approximately the same; some more and some a little less.

Q. All right, and the post office at Poulsbo, will you explain what you found there?

A. I talked to the owner, Joseph P. Nentor, Jr., the owner of the building, and I talked to him Friday, September 10, 1960, and I have listed there the amount that the land cost. That is taken from the deed of record in the title company's office. The purpose of that was—it is slightly irrelative but it does show the owner the cost of the land at the time it was bought.

That building contains 3,098 square feet and it is very comparable to the subject building in that it has 3,098 square feet, and the subject building has 2,733 square feet, and the rent on that is \$316.66 per month, or \$3,800.00 per year.

My estimated rent value of the subject building is \$290.00 a month or \$3,480.00 a year, or \$.10611 against Poulsbo's \$.10221.

Q. On a square foot rental you are within 4/1000ths—

A. (Interposing): Yes. [190]

Q. (Continuing): —of the same amount?

A. Yes, a little less than that; three and something.

Q. Is the structure of the two buildings approximately the same?

A. Yes, it is a post office building. It is a concrete-block constructed building and in a general way it is very comparable to the subject building.

(Testimony of Arnold H. Burmaster.)

Q. And is it also available to get to the back of that building?

A. Yes, it is. It has a canopy upon four metal poles, three or four, just metal poles open all the way around. It is just a canopy in the back.

Q. All right; on Page 21—the Poulsbo is 22 and the next would be 23? A. 23?

Q. Yes.

A. That is on land—that is a piece of property that was sold by Myra L. Woodley, a widow, to Joseph P. Mentor, and Joan L. Mentor, his wife, May 9, 1960.

The price was \$7,800.00; excuse Number 34966.

Q. We are not interested particularly in that. What would that lot be worth? That lot is worth \$7,800.00? A. That is what he paid.

Q. The square-foot value of the land?

A. The square-foot value, on 51x92, that lot is— [191]

Q. Yes?

A. 4,692 square feet. The square foot cost is \$1.662.

Q. And the subject building has a square foot of?

A. 2,733—no, land is 4,568 square foot, and the square-foot value is \$1.548.

Q. Is that its lease value in the vacant lot just close to the post office? A. Yes.

Q. In your opinion, if a person didn't have to rent the building and wanted to rent it, and the landlord didn't have to take a rent on it but wanted

(Testimony of Arnold H. Burmaster.)

to rent it, what would be a fair value for them to come to on the subject building?

* * *

A. \$290.00, in my opinion, per month. [192]

* * *

Cross-Examination

By Mr. McAteer:

Q. Mr. Burmaster, I notice in your comparables that you figure a front foot cost for your land sale Number 12, but you do not figure a front foot cost for your rental comparable. Is it not a fact that front footage for a mercantile business is a factor to be considered?

A. In some cases it is. In some places one lot is wide and another is narrow. All things being equal, it would be a factor, but some lots have a narrow front footage and others a wide one and less depth. Each situation is usually different unless it is in a district where all lots are the same and all conditions are the same.

Q. Referring to Comparable Number 10, which is the drug store owned by Archie Lippman, on Page 21 of your report, that store is used as a drug store which utilizes a considerable amount of advertising in their front windows; is that not a fact?

A. Yes.

Q. And, therefore, it is desirable for a drug store to have a good percentage of their wall space

(Testimony of Arnold H. Burmaster.)

in the front? A. Yes, it would be.

Q. And that would be an advantage for a building used as a mercantile general purpose building, to have it wide and short rather than narrow and long? [193]

A. If you wanted to use it for drug store purposes only. There are other purposes which might not require that.

Q. Isn't it also a fact that the Number 10, the drug store, is comparable in length to that of the post office? A. It is 88 feet deep.

Q. The drug store is 88 feet deep?

A. Yes.

Q. And the post office is approximately 95 to 100? A. 92.

Q. 92? A. No, it is 100; exactly 100.

Q. And yet the drug store is 13 feet wider and its fair estimated rental value is \$30.00 a month less?

A. The drug store had no side driveway to it, and the subject building has, which is, more or less—you would have a corner influence, much more easily accessible than the drug store building would be. Therefore, it would have a greater value in my opinion.

Q. Wouldn't that relate to the particular use that the building is used for and use requiring rear access is not necessarily the highest and best use?

A. In some cases that might be. In my opinion it would have a decided value, in my opinion, because you have an access you drive in and park

(Testimony of Arnold H. Burmaster.)

in the back on the vacant property that is in the back of the drug store—of the [194] post office building, drive in and park while you are shopping, and it could be a decided advantage in many, many businesses.

Q. What is the size of the lot in this drug store?

A. It is under the ground, I presume.

Q. My question was: What is the——

A. (Interposing): I mean, under the building.

Q. What is the lot size of the land upon which the building is placed? A. The drug store?

Q. Yes.

A. I wasn't too concerned about that. My comparable is rent space; what is unit rent. I didn't go into the capitalization part of that because it would have been impracticable because there would be no comparison.

Q. Did you determine whether the drug store had rear access? A. Yes.

Q. Does it? A. It does have.

Q. Where delivery trucks could park and deliver goods to the drug store? A. Yes.

Q. Wouldn't that essentially serve the same function as a side alley?

A. To a degree; you would have to build an addition on it [195] for protection for a loading platform; I presume you would.

Q. Wouldn't the loading platform be——

(Whereupon, there was a brief pause.)

(Testimony of Arnold H. Burmaster.)

Q. Wouldn't a loading platform be an adjustment to the property that would be required for some particular uses and not required for others?

A. Yes, if you were speaking of post office use. Comparables to the subject building is what I am comparing it to, and the subject building does have that which would make it more useful for most purposes, in my opinion, than the drug store, and, therefore, would command a higher rent. It is quite obvious to me. [196]

* * *

Q. (By Mr. McAteer): Mr. Burmaster, the comparable you have used, Numbers 1 to 5, are all in Winslow, Washington, are they not?

A. Yes, they are.

Q. Did you inquire of the tenant or of the landlord as to those five comparables concerning whether or not utilities were furnished by the landlord?

A. No. I did inquire regarding heat.

Q. And what was the answer?

A. Heat is supplied by the tenants.

Q. In all five cases?

A. Yes, I think so. I asked him about two or three and I said, "Do the tenants furnish their own heat?" and he said, "Yes, I have a propane tank and they get it a little cheaper, but they supply their own heat."

Q. That is what you found out as to Comparable Number 1? A. Yes.

(Testimony of Arnold H. Burmaster.)

Q. And to Comparable Number 2?

A. Yes. [197]

Q. Number 3?

A. That whole group is in there under the same ownership.

Q. Which of those five are on a month-to-month tenancy?

A. I can't answer that question, sir.

Q. And which ones are on a lease?

A. Kahn's is on a lease and that is the only one I know of.

Q. In your experience are tenants who hold under leases generally—

Mr. McAteer: Strike that.

Q. (By Mr. McAteer): Is it not a fact that the monthly rental as established by a long-term lease is generally somewhat less than the rental paid on a month-to-month tenancy because of the stability of occupancy?

A. In some cases, yes, and in some cases, no.

That would probably—it is difficult to answer that problem exactly in every case. In general, that is true, the general impression. It is my idea that, generally speaking, that long-term leases get it for a little bit less than the monthly tenants. However, in all those things it is so hard to make a fast rule on that because an owner sometimes, it has been my experience, on occasions have tried to fill up the building with tenants. This could be, maybe, to get the thing started and to get them in business

(Testimony of Arnold H. Burmaster.)

to make the thing go. So it is hard to [198] apply a fast rule.

A long-term tenant naturally would be favored over a month-to-month deal, but not necessarily always.

Q. Is it not always a fact that a tenant such as J. C. Penney's who would be willing to grant a five-year lease, would be favored in rental terms over a businessman with little business experience and it was a relatively new venture?

A. I would say yes, Penney's, Montgomery-Wards and Sears are classed as A-1 leases, but again, the same conditions apply, particularly in somewhat little places.

Q. Would it not also be a fact that the Government would be more closely akin to a solvent corporation like J. C. Penney's, rather than an up-start businessman who has little or no financial backing or experience?

A. Very much so, but it would depend entirely on the terms of the lease and the conditions under which they could move out. All those things would enter into it. As a rule, definitely, financial responsibility is a determining factor, such as oil companies about leases.

Q. Is it not also a fact that all of the comparables, 1, 2, 3, 4 and 5, are located at Winslow, Washington, and have access from the rear?

A. Yes, they do. I don't know of any I know that don't because it is there.

Q. And the utility to the occupant having a side

(Testimony of Arnold H. Burmaster.)

alley would [199] be merely a matter of preference without any economic advantage that you can point to?

A. Yes, it would definitely be an economic—I point, for instance, to parking for the drug store or any business located there. If you are there, you come in the alleyway below there. With the post office building there is this. You turn in the alley and park. It is a decided advantage. Necessarily, just the distance makes that.

Q. How much parking facility is available at the post office? A. 92 feet.

Q. And that is room for how many cars?

A. 92 feet would be room for about 10 cars, possibly; with the wide cars, maybe nine, ten feet to a car.

Q. Some of the comparables, notably Comparable Number 2, is only 88 feet in depth. How deep is that lot?

A. I don't know, sir. Comparable Number 2? That is—I think it is the same difference. I am not appraising the property, see, but the rental value; the square-foot rental value on those properties.

Q. If you are adding a plus value for parking space on a tenant other than Riley's Home Furnishings, they could well put a parking lot in the rear of Comparable Number 2, could they not? [200]

* * *

A. I think it would be, possibly, not impossible

(Testimony of Arnold H. Burmaster.)

but highly improbable to stick a parking lot in the back of Riley's store and I don't think the owner would go for it. If he did, he would get more compensation for the ground if he is renting for parking purposes, if he is making a public parking lot in there.

Q. Do you know how long Riley's have occupied that? A. No, sir, I do not.

Q. Are you acquainted with the—I notice you have no comparables of similar general purpose mercantile stores in Poulsbo?

A. No. I have a very fine comparable that is used for the same purpose in Poulsbo that was very satisfactory to me, and again we run across the same identical thing, sir. If I start looking around for the waterfront at Poulsbo and those little stores, they are not comparable to the [201] properties I am appraising. It is my mission to find as near a comparable as I can, and in estimating and in balancing the value.

Q. What factors would make the property at Poulsbo dissimilar?

A. Dissimilar to the subject property?

Q. Yes.

A. There is no factor. I don't think—the two towns are about the same population and they are about the same size, and I don't see anything that would particularly—see anything that would make them dissimilar. The buildings are somewhat similar. They have a driveway and a canopy in the rear.

(Testimony of Arnold H. Burmaster.)

Q. Referring to Comparable Number 2, what is the general condition of that building?

A. It is as good as the rest of them there, very good.

Q. That building is approximately the same frontage as the post office property, is it not?

A. Well, no—yes, frontage. I have it 30 feet.

Q. And it is 88 feet as compared with 100 feet in depth? A. 192.

Q. I am speaking of the improvement.

A. Oh, the improvement; yes, 100 feet.

Q. And the square footage is roughly the same, is it not? A. Yes, it is, generally, yes.

Q. And that has a square-foot rental basis of \$.0663? [202] A. Yes.

Q. If the subject property was occupied by someone other than the Government, would they not pay a rent that is comparable with the going rate on the same street?

A. Sir, anyone in business would quickly recognize the advantage of that driveway along the side. It doesn't matter what business you are in, parking is certainly one of the things that are problems in almost any business. Almost any little community has them. They would recognize the difference in value of the two places.

Q. In comparing the process of arriving at an opinion of reasonable rental value as compared with the process of arriving at a reasonable sales price, is it not more difficult to arrive at a valuation, a rental valuation compared to a sales price?

(Testimony of Arnold H. Burmaster.)

A. In order to find the value, rental value, of any commodity, any goods or any property, it is first necessary to know what that thing costs and what the expense involved will be, and then you get your total and then you estimate the value of money and the duration of your investment, see, so that, first, you have to do what you asked me about before you can determine the rental value. I mean, that is the better proof. You can get it by comparative rents, which is usually done in a quick way, but in buying a building you want to know the income and [203] the durability of it. You certainly would have to have a basis on which to predicate that, because you must allocate the percentage that you want to use in covering this investment.

Q. But the real test is what the property will bring in the market place, is it not?

A. That is right, comparable properties.

Q. Rentals are a poor test of what the property is worth—poorer than the mathematical formula of arriving at a valuation and then capitalizing it?

A. There is nothing better; if you can find the identical property under the identical condition, there is nothing better, and that is the one difficult thing about appraising, that it is hard to find the most desired comparable.

Q. Doesn't Orgel in his book on valuation—you are familiar with that volume, are you not?

A. Who?

Q. Orgel's?

(Testimony of Arnold H. Burmaster.)

A. I don't know that I read his. I have read so much in the American Appraiser.

The Court: Orgel is a law book.

The Witness: I don't know.

The Court: Is that the one you are referring to?

Mr. McAteer: Very right. I was misinformed, your Honor. [204]

Q. (By Mr. McAteer): In appraising property using comparable sales or comparable rentals, it is almost, in every case, impossible to find identical comparables, is it not?

A. It is usually very difficult to find identicals.

Q. The most an appraiser can normally hope to find are properties with similar characteristics?

A. That is right.

Q. Located in the same vicinity?

A. In comparable locations.

Q. Is it not true that as to residences the same type of a house in Bremerton may sell for substantially less than the same house in Seattle?

A. It could be. That depends again on it would not be in a comparable location. The thing that would detract from it would be economic obstacles or the economics would apply to the district. There are so many things involved in that. My answer to your other question was that under the same conditions that would apply to districts, to surroundings, schools, and everything else—the economic influence, in other words.

Q. The economic influence of the comparable one to five are more closely identical to the subject

(Testimony of Arnold H. Burmaster.)

property than Comparable Number 6 located in Poulsbo, is it not?

A. I would say not, because I think the business property [205] is somewhat the same and the utility of the two are the same and the price—about as close as you could get. The one at Poulsbo, the Post Office Department is paying \$.10211.

Now, the value set up for this comparable utility post office building of the same type is set up for \$.10611. It is awfully close. A difference of \$25.00 in that capitalization income approach would make them identical and it is awfully hard to get much closer than that in any building.

Q. On Comparable Number 1, looking at the photograph, what is on the right-hand side of the building, looking at it from the front?

A. A paved alley.

Q. And what is in the rear of that building?

A. Alley, paved, and dirt cut back.

Q. Is there parking alongside the building in the rear?

A. You could if you blocked the parking strip there.

Q. If you were to apply the average of the five comparables located in Winslow to the square footage of the building of the subject property, what valuation would you arrive at?

A. I don't know, sir. I didn't use those. They weren't good enough.

Mr. McAteer: No further questions. [206]

(Testimony of Arnold H. Burmaster.)

Cross-Examination

By Mr. Jamieson:

Q. Mr. Burmaster, are you pretty well acquainted with rental values?

Mr. Jamieson: Strike that, please.

Q. (By Mr. Jamieson): Have you been very well acquainted with rental values in Winslow for any period of time?

A. Not until I came over to make this evaluation, sir.

Q. And when you were making that evaluation, did you make that investigation into rental values back to December, 1956? A. No, sir. [207]

* * *

SAMUEL J. CLARKE

upon being called as a witness for and upon behalf of the defendant, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Samuel J. Clarke, C-l-a-r-k-e.

Direct Examination

By Mr. Jamieson:

Q. Mr. Clarke, where do you reside?

A. On Bainbridge Island, Manito Beach West on Bainbridge Island [210]

* * *

(Testimony of Samuel J. Clarke.)

A. Before I became a realtor I was an engineer for the United States Government in the Topographic Section of the Navy Yard where I helped prepare maps and briefs for condemnation of property on which was based the fee which the Government would offer.

Also, since being in the business as a licensed realtor, I have been called on to appraise properties for states, sometimes representing the State of Washington and sometimes the estate itself.

Q. How many times have you been called upon to testify in regard to an independent fee appraisal?

A. I believe this is only the third time.

* * *

Q. And in making that appraisal, did you determine a reasonable rental value as of December 1, 1956? [211]

A. Yes.

* * *

Q. Will you answer the question as to what is your appraisal as to the reasonable rental value as of December 1, 1956?

A. \$330.00 a month.

Q. All right, how did you determine this appraisal value? I took the replacement value of the building plus the cost of the land and I have determined in my own business that a fair return on an investment, considering the money invested and the taxes and the insurance and the depreciation for necessary repairs, to be made for tenants, to be roughly, in fact very accurately, 1% per month, and if a person can't get 1% a month in my business, then they [212] should go out of the business and

(Testimony of Samuel J. Clarke.)

on my own properties that is the determination I use and that is what I used in this case. [213]

* * *

Cross-Examination

By Mr. McAteer:

Q. Mr. Clarke, are you a graduate of any school?

A. No. You refer to colleges?

Q. Yes. [215]

A. I didn't quite complete my university course.

Q. Your work as an engineer for the Government had to do with mapmaking and drafting?

A. And design, yes.

Q. It did not have anything to do with placing valuations on property?

A. Not as—to a great extent, except in the one instance I mentioned when the Navy was condemning various properties in this part of the country in the beginning of the war.

Q. And what capacity did you play in placing valuations on properties for the Navy at that time?

A. I was topographic engineer and would prepare plans and maps of the areas to be condemned, and would consult with the official who went and condemned these properties that needed to be condemned. Sometimes they would take an estimate for what it was worth and settle for that, but many cases had to be condemned.

Q. It is true then that your function in preparing topographic maps was to go in the field and

make maps of the improvements, whether frame or concrete, and prepare data used by the actual person who placed a valuation on the property?

A. That is true.

Q. But you, yourself, did not place a valuation on the property? A. No. [216]

Q. What type of property did you appraise in your two other court experiences as an appraiser?

A. They were both residences.

Q. What states were they located in?

A. Both on Bainbridge Island.

Q. And you have had no previous experience as an appraiser of commercial property?

A. Not in court.

Q. And it is a fact that you have had no previous experience appraising leasehold valuations as compared with a sale valuation?

A. You might construe it that way. [217]

* * *

CHARLES L. SEAVEY

upon being called as a witness for and on behalf of the defendant, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name, and spell your last name, please?

The Witness: Charles L. Seavey, S-e-a-v-e-y.

Direct Examination

By Mr. Jamieson:

Q. Would you please tell the court your name, sir? A. Charles L. Seavey.

(Testimony of Charles L. Seavey.)

Q. And where do you reside, sir?

A. On Bainbridge Island.

Q. And what is your occupation?

A. I am retired.

Q. What were you before you retired?

A. The postmaster at Winslow.

Q. Were you the postmaster at Winslow between January 1, 1956, and December 6, 1956?

A. Yes, sir.

Q. What period of time were you postmaster at Winslow?

A. From September, 1954, to July in 1958. [226]

* * *

Q. (By Mr. Jamieson): Do you know of your own knowledge when the postal equipment and post office facilities were moved into the building that is presently occupied by the post office at Winslow, Washington?

A. I don't know the exact date. It was somewhere in late 1956, in my memory.

Q. And how did you have—did you have charge of the post office and the moving in?

A. Yes, I did. [227]

* * *

Q. If, prior to May 23, 1956, anyone would have come to you and asked you about the terms of any proposal to lease by Mr. Camaratta of a building at Winslow, Washington, would you have been able to inform them?

A. No, I wouldn't.

* * *

(Testimony of Charles L. Seavey.)

Q. (By Mr. Jamieson): And if, specifically, Earl L. Sands had come and asked [228] you for information regarding a proposal to lease by Mr. Camrada, would you have been able to inform him?

A. I don't think so.

Mr. Jamieson: I believe that is all.

Cross-Examination

By Mr. McAteer:

Q. Mr. Seavey, you have stated that you would be unable to inform a person asking you a question as to the terms of that proposed—or proposal to lease; but it is a fact that you would be able to tell them of the existence of such an agreement?

A. Of a proposal to build or proposal to lease?

Q. Of some agreement? A. Yes. [229]

* * *

Q. Mr. Seavey, you—prior to May 23, 1956, you—it is a fact that you knew of the existence of some agreement between the Post Office Department and James Camrada? A. Yes.

Q. If someone had inquired of you what was the nature of that agreement, what would you have told them?

A. Well, it was a proposal to build, purchase and lease.

Q. The building and leasing of a post office building is not a primary responsibility of a local postmaster? A. No, sir.

(Testimony of Charles L. Seavey.)

Q. But such information is available at the Postal Inspector's Office in Seattle?

A. I believe so.

Q. If someone were to have inquired of you in the spring of 1956, or in the summer of 1956, as to the nature of that agreement, it is a fact that you would have referred them to the Postal Inspector or to the Seattle Office, or to some other appropriate Post Office official who had actually some knowledge of the agreement? A. Yes, sir. [230]

* * *

Cross-Examination

By Mr. Garland:

Q. Were you under any instructions as to what information you would give to a person if they inquired about a lease being constructed—about a building being constructed for the Post Office; were there any instructions as to who you should give information to? A. No, sir.

Q. You heard the testimony this morning of the inspector that was in charge of the Post Office being built; did you hear that this morning?

A. Yes.

Q. And he said he would not give out information, as I understand it, unless it was to a person that was authorized. Did you have the same instructions or not?

A. I had no instructions on it.

Q. Did you personally have any knowledge of it,

(Testimony of Charles L. Seavey.)

of what the building was being built for, and the terms of the lease, or if there was a lease?

A. No.

Q. That was not your department?

A. No. [231]

* * *

EARL L. SANDS

upon being recalled as a witness for and upon behalf of the defendants, and having been previously duly sworn, testified as follows: [237]

* * *

Redirect Examination

By Mr. Jamieson:

Q. Mr. Sands, have you formed an opinion as to the reasonable rental value of the premises here in question? That is, the building being occupied by the post office? A. Yes, I have.

* * *

Q. Do you have an opinion as to the reasonable rental value of the premises here in question as of December 1, 1956? A. I do.

Q. And what is that? A. \$333.00 a month.
Mr. Jamieson: Thank you.

(Testimony of Earl L. Sands.)

Recross Examination

By Mr. McAteer:

Q. Mr. Sands, how did you arrive at that evaluation?

A. Well, by talking with other people that have buildings, [254] and talking to people that rent warehouse space and checking with Mr. Mentor to find out what he was getting to a post office comparable to mine at Poulsbo, and checking on the amount of money I have in it.

I have \$33,000.00 in it, and figure I should have at least 1% on my investment.

Q. Are you adopting the opinion of Mr. Clarke?

A. Of Mr. Clarke—do you mean Mr. Clark Mentor in the Poulsbo Post Office?

Q. No, Samuel J. Clarke, who appeared as a witness.

A. No, I have had my price on this building long before Mr. Clarke ever entered into it.

Q. In your opinion has the rental value of the post office gone up or gone down since December, 1956?

A. Since December, 1956? It certainly hasn't decreased any. I am not in any position to state what other real estate—how it has gone up, but I do know that property over there has not gone down.

Mr. Jamieson: The defendant Sands rests, your Honor. [255]

* * *

OTTO LIPMAN

upon being called as a witness for and upon behalf of the plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Otto Lipman, O-t-t-o L-i-p-m-a-n.

* * *

Direct Examination

By Mr. McAteer:

Q. Do you own any property in Winslow, Washington?

A. I do, adjoining the Sands' property.

* * *

Q. Thank you. How much property do you own?

A. 192 feet facing Winslow Way, and 310 feet back.

Q. Does that property consist of the five stores that were testified to—— [257] A. Yes, sir.

Q. ——by Mr. Burmaster, earlier——

* * *

(Testimony of Otto Lipman.)

Q. As to the property commonly known as Kahn's, and Mr. Burmaster—did Mr. Burmaster correctly state the rental of the main floor of that building?

* * *

Q. What is the rental received for the main floor of that building?

A. The main floor is \$275.00, and the upper floor is \$125.00. It is a five-room apartment.

The Court: The upper is what?

The Witness: A five-room apartment.

The Court: What is the rent for the upper?

The Witness: \$125.00. They are all together, listed as joint. [258]

Q. (By Mr. McAteer): Mr. Lipman, you have stated that your property is 192 feet in the front and 310 feet deep? A. Yes, sir.

Q. Describe the rear area of your property.

A. Well, the rear area is customer parking, consisting of about, I should say, 145x100, or 150.

Q. You have 14,000 to 15,000 square feet of parking area?

A. Approximately. That is all we need.

Q. From what directions, if any, is there access to that parking area?

A. Access from Winslow Way, 14½ feet, and after you come in the back, you go out in about a twenty-foot alley. I have two accesses, one in the front and one in the back.

(Testimony of Otto Lipman.)

Q. Is this parking area utilized by the five stores facing Winslow Way?

A. Yes, sir, Mr. Wohlfrom knows it, he saw it.

Q. Does it provide suitable parking for the demands of those commercial establishments?

A. Oh, yes.

Q. What is the nature of the construction of that building? A. Oh, I don't know; first-class.

Q. Are the walls plastered? A. Oh, yes.

Mr. Jamieson: Excuse me. Will you speak up? I am [259] sorry.

A. I say, first-class buildings. You couldn't make them any better.

* * *

Q. What is the material composition of the walls?

A. The walls are all plastered and rock lath.

Q. And underneath the plaster is rock lath?

A. Rock lath, **insulation.**

The Court: Concrete block?

The Witness: Concrete block, and insulation and plaster, and the roof is made out of regular insulation.

Q. (By Mr. McAteer): When were these buildings built? A. About five years ago.

Q. Are the walls separating the individual buildings single walls or party walls, if you know?

A. They are plastered on both walls. They are made so I can remove a wall and make one store out of two. They have iron posts. [260]

(Testimony of Otto Lipman.)

If I want to make a store bigger, I can take out a wall and still the iron posts will hold it.

Mr. McAteer: No further questions.

Mr. Jamieson: I have no questions.

The Court: Now, Mr. Lipman, as long as you are here, I think I will ask you a few questions.

The Witness: Okay.

The Court: Of these various buildings that are referred to here, one of them is known as the Kahn property?

The Witness: That is right.

The Court: And the other, the Riley's Home Furnishings?

The Witness: Yes, sir.

The Court: And the third one is Hansen's Electric?

The Witness: Yes, sir.

The Court: And four is occupied by Pacific Telephone and Telegraph?

The Witness: Yes, sir.

The Court: And five is the Winslow Drug?

The Witness: Yes, sir. This is the first one I built when I came on the island. We started it ourselves.

The Court: When was that built?

The Witness: About eight years ago.

The Court: Now, the other buildings were all built about the same time?

The Witness: Well, Kahn's is two years old and the [261] others are about five years old.

The Court: With respect to the other building,

(Testimony of Otto Lipman.)

has the rental been about the same for the last five years?

The Witness: Well, the rental has been the same for the last five years.

The Court: There hasn't been much variation?

The Witness: No, the lease has been written together, almost; one of them a couple or two or three months later, but the leases were issued upon completion of the building.

The Court: So that Riley's has been occupied under lease for five years?

The Witness: Four and one-half years now.

The Court: So that the rental they are paying now is the same as they were then?

The Witness: Yes, sir; they have an option, also.

The Court: What is that?

The Witness: Five more years' option.

The Court: There is a lease for five years with another five-year option?

The Witness: Yes.

The Court: What about Hansen's?

The Witness: They have a change, and the telephone company is ten years straight, and the drug store, ten years straight, and Kahn's had it for two years' trial, and now they took a lease for five years more. [262]

The Court: What was the rental for the first two years?

The Witness: The same.

The Court: I think that is all.

Mr. McAteer: You may inquire of the witness.

(Testimony of Otto Lipman.)

Mr. Jamieson: I have no questions of the witness.

Mr. Garland: I think I have one.

Cross-Examination

By Mr. Garland:

Q. Mr. Lipman, the breakdown on your building as rented to Kahn is not made on the lease, is it; so far as you and Kahn are concerned, you get \$400.00 a month? A. I get \$400.00 a month.

Q. And you break it down as \$275.00 and \$125.00 for your capitalization?

A. We were talking, when they took the store alone, and then they figured they wanted to bring in a manager and wanted an apartment, and so I recalled the lease and made it \$400.00.

Q. You don't know how they break it down; they may make it \$315.00 and \$85.00?

A. I originally quoted them \$275.00 and then I upped it to \$400.00.

Mr. Garland: That is fine.

(Witness excused.) [263]

JOHN L. VAN BUSKIRK

upon being recalled as a witness for and upon behalf of the plaintiff, and having previously been duly sworn, testified as follows:

Direct Examination

By Mr. McAteer:

Q. Mr. Van Buskirk, are you acquainted with the various costs to the post office of post offices in various communities in your region?

A. My principal duty is to analyze the bids that come in and see that they are properly justified and properly in line with what the Post Office should or can pay for the facility, yes.

Q. Have you or your staff prepared a cost breakdown of the rentals paid by the Post Office for the various post office facilities in your region?

A. We keep a running or spot check from time to time and have for the last year and a half just to keep in tune with the general tendency of post office rents and how we are making out with our bidding, and what we need to straighten them [265] out.

* * *

Q. (By Mr. McAteer): What is the annual rental paid by the Post Office for the facility at Marysville?

A. At Marysville the annual rental is \$4,200.00.

Q. And how many square feet does that involve?

A. Our square-foot area in that is 3,206 feet.

(Testimony of John L. Van Buskirk.)

Q. What is the type of—

Mr. McAteer: Strike that.

Q. (By Mr. McAteer): What is the annual rental paid by the Post Office at Redmond, Washington?

A. Redmond? We have an annual rental of \$6,800.00.

Q. And the square footage?

A. Square footage in that is 6,163 feet.

Q. What is the annual rental at East Stanwood?

A. East Stanwood is \$3,816.00.

Q. And the square footage of the building?

A. The square footage of the building is 3,102 feet.

Mr. Jamieson: Will you say that again, please?

The Witness: 3,102 feet.

Q. (By Mr. McAteer): The square footage of the building at Darrington? [271]

A. The Darrington building, the square footage?

Q. Yes. A. 1,793 feet.

Q. 1,7— A. 1,793 feet.

Q. And the rental paid?

A. \$1,700.00. [272]

* * *

EARL A. WOHLFRAM

upon being recalled as a witness for and upon behalf of the plaintiff, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. McAteer:

Q. Mr. Wohlfram, did you handle the negotiations on behalf of the Post Office for the lease—construction and lease of the facilities at Poulsbo?

A. Yes, sir.

Q. Will you compare the—describe generally the construction of the building at Poulsbo in comparison with construction of the building at [273] Winslow.

* * *

A. Basically, the Winslow and the Poulsbo buildings are the same; the same type of construction and the same general plan and the same materials in most respects. That is, concrete block walls, one-story building, asphalt tile floors; the facilities in the Poulsbo building are somewhat more extensive than they are in the Winslow building.

Mr. Jamieson: Excuse me. I didn't hear the witness. Will you repeat that?

A. (Continuing): The facilities in the Poulsbo building are somewhat more superior to those in the Winslow building. In the Poulsbo building we have what they call a box lobby which requires an additional wall inside whereby the door can be locked between the finance section and the box,

(Testimony of Earl A. Wohlfram.)

section at night so that the box section can remain open twenty-four hours without the public having access to the finance section.

It also includes what we called a curtain wall, which is a wall over the box section to partition it off from the work room so that nobody can climb over the top and get into the building. [274]

I believe at Winslow we have just a screen wall, or screen equipment above the box section and finance section.

Then the rest facilities for male and female employees, of course, are somewhat more extensive because of the larger personnel in the office.

Q. (By Mr. McAteer): Does the building at Poulsbo have four independent walls?

A. Yes, sir.

Q. The facility at Winslow has a party wall?

A. That is right.

Q. Was the party wall at Winslow a pre-existing wall? A. It was.

Q. And that would decrease cost of construction at Winslow? A. Yes, sir.

Q. Have you an opinion—was the lease—construction and lease of the property at Poulsbo arrived at under the call for bids and proposal to lease procedure?

A. Yes, sir. There was this difference, that at Winslow it was upon bid. That is, each interested owner or bidder could propose a site of his own. At Poulsbo the Government optioned one site and called for bids for construction of the building on

(Testimony of Earl A. Wohlfram.)

that site. The successful builder, or bidder, to buy the land and put the building on this one location.

The Court: That was the procedure followed at [275] Poulsbo?

The Witness: Yes, sir. It was an option site by the Government.

The Court: Do I understand that the Government received an option on the property?

The Witness: An option to purchase, yes, sir, and the option has been assigned to the successful bidder who purchases the ground and builds the building.

The Court: At the price affixed for it?

The Witness: Yes, sir, at the price affixed in the option.

Q. (By Mr. McAteer): When you received the bids, do you recollect, do you collect all the bids and forward them to the Department?

A. Yes, sir.

Q. With your recommendation?

A. Yes, sir.

Q. In making your recommendations, do you become generally acquainted with the rental values of properties in the area? A. Yes, sir.

Q. Was the bid at Poulsbo, Washington, generally in line with the reasonable rental value of other rental properties at Poulsbo?

A. Well, yes. Ordinarily the Government gets as favorable [276] terms as any rental will if you have a comparable building to compare the post office with, just——

(Testimony of Earl A. Wohlfram.)

Q. Then in general the cost to the Post Office reflects the market value in the area on a favorable basis to the Post Office? A. That's right. [277]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Mr. Wohlfram, the effect of a party wall really doesn't affect the value so far as rental is concerned, does it?

A. No; well, yes, it will to the extent that the cost of construction will be somewhat lower and then the building should rent for a lower rate—maybe at the same rate, but there wouldn't be the investment there to base that rent on where you built four walls.

Q. But still there is still the same number of square feet, isn't there? A. That is right.

Redirect Examination

* * *

By Mr. McAteer:

Q. What factors account for the variation in bid price from [278] area to area?

A. Well, I think there may be a number of factors. One town is a progressive town where business is quite active and rentals are higher than in a town where, you might say, it is retrogressing and business is going down rather than up. That has a bearing on the rentals that can be demanded for

(Testimony of Earl A. Wohlfram.)

property, and I think it is the principal cause for variation in rentals.

* * *

Q. At the time that the contract was entered into with Camrada, where was the principal business activity in Winslow in relation to the subject property?

A. Well, it was on Winslow Way. The office—Mr. Camrada's property was possibly two or more blocks from the former location and at that time was in an area that had not been [279] very well developed for business purposes.

I don't know the directions in east and west of Winslow Way, but we moved it from one end of the town up to Mr. Camrada's property, which was, you might say, on the opposite end of the street.

* * *

Recross-Examination

By Mr. Garland:

Q. Was Winslow considered in 1946 as a progressive community where the rents would be, or would have probably been higher?

A. I considered it a progressive community.

Mr. Garland: That is all. I beg your pardon, I had my years off there.

Q. (By Mr. Garland): In 1956? You understand what I meant? A. Yes, sir.

* * *

[Endorsed]: Filed March 10, 1961. [280]

[Title of District Court and Cause.]

No. 4959

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith, the following original papers in the file dealing with the action together with exhibits, as the record on appeal herein to the United States Court of Appeals at San Francisco, to wit:

1. Complaint, filed Dec. 4, 1959.
6. Answer of First Federal Savings and Loan Association of Bremerton, filed Jan. 7, 1960.
30. Pretrial Order, filed Sept. 13, 1960.
34. Court's Memorandum Opinion, filed Oct. 18, 1960.
40. Exceptions of First Federal Savings and Loan Association of Bremerton to Findings of Fact and Memorandum of Authorities, filed Nov. 28, 1960.
42. Findings of Fact and Conclusions of Law, filed Dec. 5, 1960.
43. Judgment and Decree filed December 5, 1960.

[Endorsed]: No. 17303. United States Court of Appeals for the Ninth Circuit. First Federal Savings & Loan Association of Bremerton, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 13, 1961.

Docketed March 16, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for Ninth Circuit

No. 17303

UNITED STATES OF AMERICA,

Respondent,

vs.

FIRST FEDERAL SAVINGS & LOAN AS-
SOCIATION OF BREMERTON,

Petitioner.

STATEMENT OF POINTS
ON APPEAL

Comes Now the appellant, First Federal Savings & Loan Association of Bremerton, and hereby makes the following Statement of Points upon which they intend to rely upon appeal:

I.

The court erred in determining federal laws, and the rules of the post office department were determinative as to the title of the property on which the post office claims they have an agreement to make a lease. Petitioner contends said agreement or lease was ineffective without recording and notarizing as provided by the laws of the State of Washington.

II.

The Court erred in deciding the evidence in this case established imputed knowledge to First Fed-

eral Savings & Loan Association of Bremerton of the interest of the United States to the property in question.

III.

The equities in this case are such that it would be inequitable to enforce an agreement to make a lease, when the Government knew the rent they had agreed to pay was disproportionately small to the value of the land and where the rent actually paid is unconscionable low compared to the rent that should be paid and is paid other places for similar rentals, and where the rent paid is so low as to be confiscatory.

GARLAND & BISHOP,

/s/ MARION GARLAND, JR.,

Attorneys for Petitioner First Federal Savings & Loan Association of Bremerton.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1961.